Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred and gave rise to a circuit conflict by holding that the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously obtained that information unlawfully.

PARTIES TO THE PROCEEDING

Petitioner James A. McDermott was the defendant/appellee below.

Respondent John A. Boehner was the plaintiff/appellant below.

Respondent the United States of America intervened as an appellant in the court of appeals to defend the constitutionality of a federal statute, 18 U.S.C. § 2511(1)(c), as applied here.

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INTRODUCTION

This petition presents a question of exceptional importance on which the courts of appeals are divided: whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously obtained that information unlawfully. At least since the days of the Alien and Sedition Acts, it has been settled that Americans have the right to disclose truthful information involving alleged official misconduct, at least where they lawfully obtained that information. Yet the D.C. Circuit majority below, over a vigorous dissent, departed from that bedrock principle. That departure is all the more troubling because the two judges in the majority could not even agree on a rationale, and because the Third Circuit recently reached precisely the opposite result. This Court should not leave the First Amendment in such disarray.

The issue here is straightforward. The plaintiff, Rep. John A. Boehner, brought this lawsuit to punish a colleague, Rep. James A. McDermott, for allegedly disclosing to the national media an audiotape of a telephone conversation among the then-Speaker of the United States House of Representatives and other top political leaders that had been unlawfully intercepted by a Florida couple, John and Alice Martin. It is undisputed that the relevant information, which involved apparent official misconduct by one of the Nation's top political leaders, was truthful and accurate. It is also undisputed that Rep. McDermott was in no way involved in the unlawful interception of the audiotaped conversation, and violated no law by receiving that communication.

The upshot of these points, as Judge Sentelle emphasized in dissent below, is that this case is controlled by a line of this Court's cases holding that any attempt to proscribe the disclosure of truthful and lawfully obtained information on a matter of public concern is subject to strict scrutiny. *See* App. 33a-38a (citing, *inter alia, Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979)). Because the federal and state wiretapping statutes

invoked by Rep. Boehner cannot remotely withstand such scrutiny as applied here, it follows (as both Judge Sentelle and the district court concluded) that this lawsuit must be dismissed on First Amendment grounds.

Even if the fractured majority below were correct that the challenged federal and state statutes are subject only to intermediate scrutiny under the First Amendment, moreover, those statutes would still be unconstitutional as applied to defendants, like Rep. McDermott, who were not involved in the underlying interception. As the Third Circuit recently held in a case on all fours with this one, the government's interest in punishing such disclosure "is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech." *Bartnicki v. Vopper*, 200 F.3d 109, 129 (3d Cir. 1999). Because the federal and state statutes here fail even intermediate scrutiny, they "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." *Id.*

This is a point of exceptional importance. Under the view embraced by the majority below, truthful information itself becomes "tainted" if unlawfully obtained by *anyone*, and the government is thereafter free to proscribe and punish its disclosure by subsequent recipients wholly unconnected to the illegality. In our free society, however, the suppression of truthful information is a matter of the utmost gravity, especially where (as here) that information relates to apparent official misconduct. In an era when the First Amendment has been construed to protect such activities as flag burning and liquor advertising, this case calls for a return to basics. If a person (including, but not limited to, the news media) lawfully receives truthful information that a high government official may have engaged in official misconduct, that person cannot be subjected to civil or criminal liability for disclosing that information, regardless of whether someone else previously obtained or disclosed that information unlawfully.

It is hard to overstate the practical implications of the contrary approach adopted below—especially for the news media, which are thereby effectively saddled with the burden of ascertaining the origin of truthful information that they have lawfully obtained. As Judge Sentelle warned, "I do not see how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again." App. 41a. This case started out as a vendetta against a political opponent on Capitol Hill, but the real victim is now the First Amendment.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 191 F.3d 463 and reprinted in the Appendix ("App.") at 1a-42a. The unreported orders denying the petitions for rehearing and rehearing *en banc* are reprinted at App. 43a-45a. The district court's unpublished order and opinion granting the motion to dismiss are reprinted at App. 46a-60a.

JURISDICTION

The D.C. Circuit entered judgment on September 24, 1999. Petitioner timely filed petitions for rehearing and rehearing *en banc*, which were denied on December 28, 1999. The Chief Justice granted an extension of the time for filing this petition to and including April 26, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent to this case:

1. The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. 18 U.S.C. § 2511(1) states:

"Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . .

shall be punished . . . ."

3. Fla. Stat. Ann § 934.03(1) is identical to 18 U.S.C. § 2511(1), except for minor typographical differences.

STATEMENT OF THE CASE

A. The Interception, Disclosure, and Investigation

This case arises out of a conference call conducted by Republican leaders of the United States House of Representatives on December 21, 1996, to discuss their response to an Ethics Committee investigation into alleged improprieties by then-Speaker Newt Gingrich. *See* App. 62a.[1] The plaintiff, Rep. Boehner, participated in that call "in his capacity as Chairman of the House Republican Conference," *id.*, the fourth-ranking position in the House Republican leadership. Rep. Boehner used a cellular telephone. *See id.*

The call was intercepted and taped by a Florida couple, John and Alice Martin. *See id.* Shortly thereafter, the Martins delivered the tape to the local office of their U.S. Representative, Karen Thurman, and were advised to deliver the tape to Rep. McDermott, the ranking Democrat on the House Ethics Committee. *See id.* at 62a-63a. According to the complaint, the Martins personally delivered the tape to Rep. McDermott on or about January 8, 1997. *See id.* at 63a.

On January 10, *The New York Times* ran a front-page article disclosing the contents of the tape. *See id.* at 64a. Similar stories also ran in *The Atlanta Journal-Constitution* and *Roll Call*, a Washington, D.C. newspaper focused on the Congress. *See id.* The story in *The New York Times* explained that the taped conversation involved a strategy session about how "to limit political fallout" from the ethics investigation, in apparent violation of an agreement between the Speaker and the Ethics Committee. *See* C.A. App. 31-33. The story did not mention Rep. Boehner.

The U.S. Department of Justice thereafter launched a criminal investigation into the interception and disclosure of

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[1] Because this is a motion to dismiss, the factual allegations in the complaint must be accepted as true. *See* Fed. R. Civ. P. 12(b). Rep. McDermott by no means concedes the accuracy of those allegations.

the tape. *See* App. 65a. On April 23, 1997, the Martins were charged with the unlawful interception of a cellular telephone call, in violation of 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii). *See* C.A. App. 38-39. As the Justice Department explained, "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies this offense as an infraction." *Id.* Each of the Martins pleaded guilty and was fined $500. *See id.* at 40; App. 65a.

B. The Political Maneuvering and Filing of the Complaint

Throughout the summer and fall of 1997, Rep. Boehner pressed the Justice Department to bring further criminal charges. In September, he asked U.S. Attorney General Janet Reno to allocate additional resources to the investigation. *See* C.A. App. 41-42. In particular, Rep. Boehner asked the Attorney General to "put aside any extraneous concerns and move forcefully to prosecute to the fullest extent possible everyone involved in this egregious violation of federal law." *Id.* at 41.

In December 1997, with no further criminal charges forthcoming, Rep. Boehner and his campaign committee requested from the Federal Election Commission an advisory opinion on whether he could use campaign funds to finance a civil lawsuit. The Commission responded in the affirmative. *See id.* at 43-46. The Commission concluded that the proposed lawsuit "resulted directly from the pursuit of [Rep. Boehner's] duties as a Federal officeholder," and that "the legal expenses at issue would not exist irrespective of Mr. Boehner's duties as a Federal officeholder." *Id.* at 45. "The conversation pertained specifically to the business of the House, particularly its Republican leadership and the actions of the House Ethics Committee. His involvement in the conversation was in pursuit of his duties as a Member of Congress and as a member

of the House Republican leadership. The recording and dissemination of the conversation occurred as a result of interest in its content and in the fact that the participants in this type of conversation were House Republican leaders." *Id.* The Commission specifically conditioned its approval on Rep. Boehner's representation that he would not achieve any "direct or indirect tax or other financial benefit" from the lawsuit. *Id.*

Rep. Boehner filed the suit on March 9, 1998. The first count charges Rep. McDermott with the disclosure of an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. §§ 2511(1)(c), 2520. *See* App. 65a. The second count charges Rep. McDermott with the disclosure of an unlawfully intercepted communication in violation of the Florida wiretapping statute, Fla. Stat. §§ 934.03(1)(c), 934.10, which is patterned on the federal statute. *See* App. 66a. The complaint does not allege that the disputed audiotape revealed any private facts about Rep. Boehner, or otherwise injured him in any way. The complaint does not seek compensatory damages, but instead statutory and punitive damages and attorney's fees and costs. *See id.* at 66a-67a.

C. The District Court Proceedings

Rep. McDermott moved to dismiss this lawsuit on the ground that the federal and state statutes are unconstitutional as applied in these circumstances. The district court (Hogan, J.) granted the motion. *See* App. 46a-60a.

The district court held that the appropriate analytical framework is set forth in a line of this Court's precedents holding that the First Amendment forbids the government from punishing the disclosure of truthful and lawfully obtained information on a matter of public concern absent a need to further a governmental interest of the highest order. *Id.* at 54a. The court emphasized that Rep. McDermott had obtained the tape lawfully, even if the Martins had intercepted it unlawfully. *See id.* at 51a-54a. As the court explained, "[t]he Complaint contains no allegation that [Rep. McDermott] directed the

Martins' actions, or that he was otherwise complicit in their crime." *Id.* at 51a. Indeed, Rep. Boehner "does not allege that [Rep. McDermott] was aware of the tape's existence until the Martins dropped it on his doorstep." *Id.* Because the statute does not proscribe the receipt of information, the court further explained, it was lawful for Rep. McDermott to receive the tape, even if it was unlawful for the Martins to disclose it. *Id.* at 51a-54a. "The First Amendment caselaw . . . suggests that information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it." *Id.* at 53a.

Applying strict scrutiny, the district court readily concluded that both the federal and state statutes as applied here violated the First Amendment. *Id.* at 57a-58a. Although the protection of privacy "is certainly a substantial government interest," the court explained, such protection is not an interest "of the highest order" at least where (as here) the plaintiff "does not claim to have suffered any direct injury," and "seeks less to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives." *Id.*; *see also id.* at 58a (application of statute "certainly cannot survive scrutiny given the circumstances of the present case, which involves more partisan skirmishing than it does true vindication of privacy interests").

D. The Court of Appeals Proceedings

A fractured panel of the D.C. Circuit reversed. The lead opinion, by Judge Randolph, refused to apply strict scrutiny on the theory that this case is not about speech at all, but rather about Rep. McDermott's conduct "in delivering the tape." App. 7a. "[B]ecause we are dealing with conduct," Judge Randolph asserted, this case "falls squarely within the Supreme Court's *O'Brien* analysis," whereby intermediate scrutiny is applied to certain content-neutral "prohibitions on conduct that create incidental burdens on speech." *See id.* at 8a, 27a (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Judge

Randolph concluded that Section 2511(1)(c) survives intermediate scrutiny as applied here because: (1) it protects important privacy interests unrelated to the suppression of expression; and (2) its prohibitions are no greater than necessary to further those interests. *See id.* at 8a-13a.

Judge Randolph then attempted to distinguish this Court's precedents. In particular, he asserted that *Florida Star* is distinguishable on its facts for a number of reasons, most fundamentally that "the illegal activity *of the Martins*, of which McDermott was well aware when he took possession of the tape, takes McDermott's actions outside of . . . the *Florida Star* line of cases." *Id.* at 24a (internal quotation omitted; emphasis added). Judge Randolph also relied on a line of cases holding that the First Amendment does not prohibit the punishment of persons (like CIA agents or grand jurors) who disclose information obtained under a concomitant duty of confidentiality. *See id.* at 24a-26a. "McDermott too obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c)." *Id.* at 26a.

Judge Ginsburg concurred in the judgment and in the portions of Judge Randolph's opinion that set forth the statement of facts, applied intermediate scrutiny, and responded to certain arguments by the dissent. *See id.* at 29a. Judge Ginsburg, however, did not join Judge Randolph's reasoning. Rather, Judge Ginsburg based his vote solely on the proposition that Rep. McDermott had not "lawfully obtained" the information "within the intendment of that phrase in *Florida Star*," even though he broke no law by receiving it. *Id.* at 32a. Under this view, a person does not "lawfully obtain" information that someone else previously obtained unlawfully, even though it is not unlawful to *receive* that information.

Judge Sentelle dissented. This case, he explained, is "controlled by" the *Florida Star* line of cases. *Id.* at 34a. The speech/conduct distinction posited by Judge Randolph is no distinction at all, Judge Sentelle noted, for "[w]hat made [Rep. McDermott's] conduct punishable under the statute was the

information communicated on the tapes. He could have provided the two newspapers with all the tapes in Washington on a given day and incurred no liability but for the speech contained on the tapes." *Id.* at 39a. The confidentiality cases cited by Judge Randolph are no more apposite, Judge Sentelle further noted, for they apply only to the disclosure of information by persons who obtained the information under a concomitant duty "to treat [the disclosed] information with confidentiality." *Id.* at 41a. Moreover, the wiretapping statutes "burden speech based on its content—that is they forbid its publication because it contains information obtained at an earlier time in an illicit fashion." *Id.* at 40a. Judge Sentelle underscored the importance of this case by noting that just "as the court holds today that the state can punish the release by McDermott based on the manner in which his source obtained that information, in a later day the state can burden the publishers of newspapers and the broadcasters of television and radio on the same basis." *Id.* at 38a.

The D.C. Circuit denied rehearing and rehearing *en banc* over the dissent of Judges Sentelle and Tatel, but stayed the issuance of its mandate pending the filing of this petition.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED AND GAVE RISE TO A CIRCUIT CONFLICT BY HOLDING THAT THE FIRST AMENDMENT ALLOWS A PERSON TO BE PUNISHED FOR DISCLOSING TRUTHFUL INFORMATION ON A MATTER OF PUBLIC CONCERN MERELY BECAUSE *SOMEONE ELSE* PREVIOUSLY OBTAINED THAT INFORMATION UNLAWFULLY.

This Court should grant *certiorari* for three reasons: (1) the decision below conflicts with decisions of this Court; (2) the decision below conflicts with decisions of other courts of appeals; and (3) this petition presents a constitutional question of exceptional importance. *See* S. Ct. R. 10.

A. The Decision Below Conflicts with Decisions of This Court.

1. This Court Has Long Held that the First Amendment Allows Punishment for the Disclosure of Truthful and Lawfully Obtained Information on a Matter of Public Concern Only Where Necessary to Satisfy an Interest of the Highest Order.

The decision below conflicts with a line of this Court's cases holding that "where a person lawfully obtains truthful information about a matter of public significance, . . . [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (internal quotation omitted); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978).[2] This is the language of strict scrutiny, which is entirely appropriate in evaluating laws targeted at suppressing the dissemination of truthful information in a free society. As this Court has emphasized, "state action to punish the publication of truthful information seldom can satisfy constitutional standards," especially where the information addresses matters of public concern. *Daily Mail*, 443 U.S. at 102; *Florida Star*, 491 U.S. at 533.

In *Daily Mail*, for example, this Court invalidated a statute making it a crime for a newspaper to disclose the name of any youth charged as a juvenile offender. 443 U.S. at 105. Because the information at issue there was truthful and had been lawfully obtained by the defendant, the Court held, its

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[2] It is well-settled that the imposition of civil liability for damages, whether pursuant to a statute or the common law, amounts to government-sanctioned punishment for purposes of the First Amendment. *See, e.g., Florida Star*, 491 U.S. at 540-41; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

disclosure could not be punished absent "the highest form of state interest." *Id.*; *see also id.* at 103 ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

Florida Star is to the same effect. At issue there was the constitutionality of a Florida statute outlawing the publication of a rape victim's name in any instrument of mass communication. *See* 491 U.S. at 526 & n.1 (citing Fla. Stat. § 794.03). It was "undisputed," the Court noted, that the challenged publication of the victim's name was "accurate." 491 U.S. at 536. In addition, the defendant had lawfully received the information, regardless of whether state law had been violated by the release of that information in the first instance. *See id.* "Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* (emphasis in original). Finally, the Court noted that "[i]t is clear . . . that the news article concerned a matter of public significance," *i.e.*, "the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 536-37 (internal quotation omitted). Under these circumstances, the Court held, the asserted governmental interests in punishing the challenged publication were not sufficiently weighty to justify the "extreme step" of punishing the disclosure of truthful information on a matter of public concern by a person who lawfully obtained that information. *Id.* at 537.

That analysis is controlling here, because this lawsuit represents an attempt to punish Rep. McDermott for the alleged disclosure of (1) truthful information (2) that he had lawfully obtained (3) about a matter of public concern. *First*, there is no question that the relevant information was "truthful"; the complaint does not allege that the contents of the disputed audiotape were in any way inaccurate or misleading. *Second*, Rep. McDermott lawfully received and possessed the

challenged audiotape because neither the federal nor the state statute proscribes the *receipt* or *possession* of an unlawfully intercepted communication. *See* App. 52a ("The federal and state statutes give no indication that the taped conversation is considered unlawfully obtained by defendant."). *Third*, and finally, there is no question that the tape involves a matter of substantial public concern. The tape suggested (if not established) that the Speaker of the House of Representatives, the man second in line for the Presidency of the United States, had violated an agreement with the House Ethics Committee not to orchestrate a political response to a forthcoming reprimand. It is hard to imagine a case that more obviously involves matters of public concern, as evidenced by the fact that the disclosed information was published on the front page of *The New York Times*. *See* C.A. App. 31.

This lawsuit thus falls squarely within the *Daily Mail/Florida Star/Butterworth* line of cases that calls for strict scrutiny, and the challenged statutes cannot remotely survive such scrutiny as applied here. This Court has expressly reserved the question whether the disclosure of truthful information on a matter of public concern can *ever* be punished consistent with the First Amendment. *See Florida Star*, 491 U.S. at 532-33 (citing *Garrison v. Louisiana*, 379 U.S. 64, 72 n.8 (1964), as "endorsing absolute defense of truth 'where discussion of public affairs is concerned'"). Even assuming that the First Amendment would permit the government to take that "extreme step" in an exceptional case, *see id.* at 537, this is not such a case.

To the contrary, this case presents about as stark an issue of free speech as can be imagined: one political leader is seeking to punish another political leader for allegedly disclosing a conversation among some of the Nation's top political leaders on a political topic. Given that the central mission of the First Amendment is "to protect the free discussion of governmental affairs," First Amendment interests are at their zenith. *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Philadelphia*

Newspapers, 475 U.S. at 778; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 & n.5 (1985).

In contrast, any governmental interest in punishing the disclosure of truthful information regarding governmental misconduct is especially weak in this case because Rep. Boehner does not allege any actual injury from the challenged disclosure. Although Rep. Boehner invokes a generalized privacy interest, he does not allege that the disputed audiotape revealed any private facts about him, and seeks only statutory and punitive (not compensatory) damages. (Indeed, the *New York Times* article breaking the story did not even *mention* him.) He has funded this lawsuit from his campaign treasury, *see* C.A. App. 45, has used it as a vehicle for political fundraising, *see id.* at 122-23, and has issued press releases at every turn, *see, e.g., id.* at 47, 121. Because this is a political dispute, not a private one, the appropriate forum is the halls of Congress, not a courtroom.

2. Judge Randolph's Attempt to Distinguish This Court's Precedents is Unavailing.

In the lead opinion below, however, Judge Randolph concluded that this case is not about speech at all, but rather about Rep. McDermott's alleged "conduct in delivering the tape." App. 7a. According to Judge Randolph, Rep. McDermott did not "exercis[e] his freedom of speech when he gave copies of th[e] tape to the newspapers" because the speech on the tape "is not McDermott's." *Id.* at 6a.

Neither Rep. Boehner nor the United States ever advanced any such theory in this case, which is no surprise: as Judge Sentelle emphasized in dissent, the statutory provision at issue here is plainly targeted at speech, not conduct. By its express terms, that provision prohibits the disclosure of information: it penalizes anyone who "intentionally *discloses* . . . to any other person the *contents* of any wire, oral, or electronic communication, knowing or having reason to know that the *information* was obtained through the interception of a wire, oral, or electronic communication in violation of this

subsection." 18 U.S.C. § 2511(1)(c) (emphasis added). This is speech, not conduct: Rep. Boehner did not sue Rep. McDermott for the mere act of passing out a tape, but instead for the alleged "disclosure" of information "for private, partisan purposes." App. 65a. If Rep. McDermott engaged in the statutorily proscribed "disclosure" of "information," he necessarily engaged in speech.

Of course, all speech necessarily entails some incidental conduct, such as moving one's lips, hitting keys on a computer keyboard, or distributing a pamphlet, book, audiotape, or videotape. But a statutory prohibition on speech is not transformed into a statutory prohibition on conduct simply because a particular instance of speech involves some conduct.[3] "[A]lthough it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment." *Bartnicki*, 200 F.3d at 120. Judge Randolph thus erred by placing this case within a line of precedent involving laws alleged to infringe expressive conduct, such as burning a draft card or sleeping in a park. *See* App. 7a-8a (citing, *inter alia, O'Brien*, 391 U.S. 367, and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

Indeed, it is bedrock First Amendment law that the dissemination of other people's speech is itself speech. That is why booksellers and pamphleteers have First Amendment rights even though they did not write the books or pamphlets. *See, e.g., Marcus v. Search Warrant*, 367 U.S. 717, 729-31 (1961); *Schneider v. State*, 308 U.S. 147, 160-62 (1939). If a

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[3] Judge Randolph suggested that the result in this case might be different "if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference." App. 7a. But there is no constitutionally significant difference between disclosing information by moving one's lips and disclosing that same information by handing over an audiotape. The disclosure of information is still speech, regardless of the *manner* in which it is disclosed.

merchant engages in protected speech, not unprotected conduct, by selling a book (or an audiotape or videotape), it necessarily follows that Rep. McDermott engaged in protected speech, not unprotected conduct, by allegedly disseminating the disputed audiotape to the national news media. Needless to say, a book on tape is just as entitled to protection as a book on paper, and it does not matter who wrote the book or whose voice is on the tape.

But Judge Randolph did not stop there: he proceeded to endorse the general proposition that the government is free to prohibit the disclosure of truthful and lawfully acquired information on matters of public concern. *See* App. 24a-26a, 28a. According to Judge Randolph, such prohibitions are commonplace and raise no First Amendment concerns. *See id.* As Judge Sentelle pointed out, however, that is simply not so. *See id.* at 41a-42a. The government can punish the disclosure of truthful and lawfully obtained information by persons who obtained that information pursuant to a concomitant duty of confidentiality, such as sensitive information obtained by a federal employee in the course of his employment, *see, e.g., United States v. Aguilar*, 515 U.S. 593, 605-06 (1995), or by a litigant in the course of civil discovery, *see, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). But the government cannot, except in extraordinary cases that satisfy strict scrutiny, punish the disclosure of truthful and lawfully obtained information by persons who did not assume and then breach such a duty. *See, e.g., Aguilar*, 515 U.S. at 606; *Lind v. Grimmer*, 30 F.3d 1115, 1118-19 (9th Cir. 1994).[4] Indeed, that

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[4] Judge Randolph's reliance on intellectual property cases is especially misplaced. *See* App. 24a. This Court has made clear that the copyright laws are constitutional precisely because they do *not* prohibit the disclosure of "facts or ideas," but only restrict the copying of the particular form of "expression." *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (internal quotation omitted); *see also id.* at 556 ("No author may copyright his ideas or the facts he narrates."); *id.* ("Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed.").

is the very point of the *Butterworth/Florida Star/Daily Mail* line of cases. Judge Randolph's contrary approach would effectively allow the government to abrogate the First Amendment by simply imposing statutory duties of nondisclosure with respect to any and all speech the government wished to suppress. That is not, and never has been, the law.

3. Judge Ginsburg's Attempt to Distinguish This Court's Precedents is Unavailing.

Judge Ginsburg provided the critical vote for the result below, but did not join Judge Randolph's reasoning. Rather, Judge Ginsburg based his vote solely on the proposition that Rep. McDermott did not "lawfully obtain" the disputed audiotape notwithstanding the fact that he broke no law in receiving the tape. *See* App. 30a-32a. According to Judge Ginsburg, a statute prohibiting the *disclosure* of information by one person is tantamount to a statute prohibiting the *receipt* of that information by someone else. *See id.* at 30a. The illegality of the disclosure, in this view, renders the overall "transaction" illegal, including the receipt of information. *Id.* To conclude otherwise, Judge Ginsburg asserted, would be "an exercise in empty formalism," in which "[o]nly the most formal minded" would engage. *Id.* at 31a & n.**.

As an initial matter, Judge Ginsburg's approach is inconsistent with two of this Court's leading cases in this area, *Landmark* and *Florida Star*. The issue in *Landmark* was whether a newspaper could be punished for disclosing truthful and lawfully obtained information about a judicial disciplinary proceeding that had been unlawfully divulged by someone else. The Virginia Constitution provided that such proceedings must be kept confidential, *see* 435 U.S. at 830 n.1 (citing Va. Const. art. 6 § 10), and a criminal statute implemented that provision by prohibiting the disclosure of information regarding such proceedings "'by any person to anyone except the Commission,'" 435 U.S. at 830 n.1 (quoting Va. Code § 2.1-37.13). The defendant newspaper nonetheless obtained and

published information regarding such a proceeding, knowing that it had been disclosed in violation of that statute. *See* 435 U.S. at 831-32.

While reserving judgment on whether participants in the inquiry could constitutionally be punished for the initial disclosure, this Court held that "third persons who are strangers to the inquiry" could not be punished for disclosing such truthful information of public concern. *See id.* at 837-38. Even though it was a criminal offense for anyone to *disclose* the information, the Court assumed that the newspaper had lawfully *received* the information. *See id.* at 837 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."). That assumption simply cannot be squared with Judge Ginsburg's theory that "[o]ne who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtained' that information in any meaningful sense." App. 30a (brackets omitted).

Florida Star is to the same effect. The plaintiff there, a rape victim, argued that the defendant newspaper did not "lawfully obtain" her name because it was unlawful for the police department to disclose it. *See* 491 U.S. at 536; *see also id.* at 544 (White, J., dissenting) (noting that "Florida law forbids . . . disclosure" by the police). This Court rejected that argument: although the police department apparently broke the law by disclosing the name, the newspaper did not break the law by receiving it. "Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* at 536 (emphasis in original). Any unlawful disclosure by the police department, in other words, did not "taint" the underlying information or otherwise render unlawful its subsequent receipt. *See id.* ("Nor does the fact that the Department apparently failed to fulfill its obligation under § 794.03 not to 'cause or allow to be . . . published' the name of a sexual offense victim make the newspaper's ensuing

receipt of this information unlawful.").[5] Indeed, the plaintiff in *Florida Star* sued the police department as well as the newspaper for the disclosure, and the department settled that case prior to trial. *See* 491 U.S. at 528.

Judge Ginsburg attempted to sidestep *Florida Star* on the ground that "the transaction in which the newspaper obtained the name was not illegal *per se*; if the newspaper had not later published the name, the police department would have violated no law." App. 31a. This "unlawful transaction" theory, however, is inconsistent with *Florida Star*'s explicit refusal to equate unlawful disclosure with unlawful receipt. In any event, Judge Ginsburg's argument fails on its own terms, because the police in *Florida Star* were in fact alleged to have violated a statutory duty to keep the rape victim's name confidential. *See* Brief for the Appellee 17-19, *Florida Star* (No. 87-329) (citing Fla. Stat. § 119.07(3), and *Patterson v. Tribune Co.*, 146 So. 2d 623, 626 (Fla. Dist. Ct. App. 1962)). That obligation, which Judge Ginsburg did not address, was distinct from the police department's separate obligation not to "cause or allow to be

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[5] In light of these express statements, Judge Randolph erred by asserting that *Florida Star* reserved in a footnote the question whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously disclosed that information unlawfully. *See* App. 16a-20a (citing *Florida Star*, 491 U.S. at 535 n.8). As noted in text, *Florida Star* expressly resolved that question. The footnote cited by Judge Randolph instead reserved the question whether the person *who unlawfully acquired the information* could be punished for the disclosure as well as the acquisition. *See* 491 U.S. at 535 n.8 (reserving the question whether "government may ever punish not only the unlawful acquisition, but the ensuing publication as well"). That much is apparent not only from the text of the footnote itself, but also from its reference to *Landmark*, where that question was also reserved. *See id.* (citing 435 U.S. at 837, which states that "[w]e are not here concerned with the possible applicability of the [anti-disclosure] statute to one who secures the information by illegal means and thereafter divulges it").

. . . published" the name of any sexual offense victim in any instrument of mass communication. Fla. Stat. § 794.03.[6]

In any event, contrary to Judge Ginsburg's assertion, it is not "formalism" but conventional statutory interpretation to conclude that a statute means what it says and says what it means. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Because it is concededly not unlawful under the wiretapping statutes to *receive* information unlawfully *disclosed* by someone else, such information is lawfully obtained by the recipient. *See, e.g., Peavy v. New Times, Inc.*, 976 F. Supp. 532, 538 (N.D. Tex. 1997) ("*Peavy I*") ("[W]hile the original tape may have been obtained illegally, it is undisputed that [the defendant] obtained the tape transcripts lawfully."). Indeed, Rep. Boehner conceded below that Rep. McDermott's "receipt of [the tape] originally was lawful," and that it would be entirely lawful for Rep. McDermott to "carry the tape around in his pocket and listen to it and smile over it." C.A. App. 167; *see also* D.C. Cir. Brief for Appellant at 31 ("[Although] the acquisition of appellant's phone call by the Martins was itself a crime, . . . Rep. McDermott's receipt of that information was not.").

To dismiss this point as "empty formalism" is to ignore the very substantial difference between proscribing the *disclosure* of information by one person and the *receipt* of such information by someone else. The latter proscriptions are far more sweeping. As Judge Sentelle recognized, if unlawfully

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[6] Equally incorrect is Judge Ginsburg's argument that *Florida Star* is "confined to information furnished by the Government." App. 31a. Indeed, the *Daily Mail* case (upon which *Florida Star* relied) expressly rejected that argument, and held that whether the disputed information was obtained from government sources "is *not* controlling." 443 U.S. at 103 (emphasis added). First Amendment rights, the *Daily Mail* Court explained, "cannot be made to rely solely upon the sufferance of government to supply . . . information." *Id.* at 104. The Court subsequently relied upon both *Florida Star* and *Daily Mail* in the *Butterworth* case to invalidate an attempt to punish the disclosure of information not obtained from the government. 494 U.S. at 632.

intercepted information is "tainted" and hence outside the scope of the First Amendment, there is no basis for limiting the "taint" only to the first person who lawfully receives that information. Anyone who read the front-page *New York Times* story about the audiotaped conversation in this case received the challenged information with knowledge that it had been unlawfully intercepted in the first instance. *See* C.A. App. 31-33. But no one would seriously argue that these readers obtained that information unlawfully. Unless and until Congress takes the extreme step of proscribing the receipt of information unlawfully obtained or disclosed by someone else, such receipt remains lawful.

Contrary to Judge Ginsburg's apparent belief, none of this is to say that unlawfully intercepted information can be "launder[ed]" through third parties who did not participate in the initial interception. App. 32a (internal quotation omitted). The term "laundered" is a loaded one: it suggests complicity between the interceptor and the discloser. It goes without saying that anyone complicit in the underlying interception—regardless of whether that person actually participated in the act of interception—did not lawfully obtain the information. The traditional doctrines of conspiracy and aiding-and-abetting exist to address just this situation. *See, e.g., Liffiton v. Keuker*, 850 F.2d 73, 77 (2d Cir. 1988) (conspiracy to intercept protected communication); *United States v. Newman*, 490 F.2d 139, 142-43 (3d Cir. 1974) (aiding and abetting interception of protected communication). Here, however, it is uncontested that "[t]he Complaint contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime." App. 51a; *see also id.* (Rep. Boehner "does not allege that [Rep. McDermott] was aware of the tape's existence until the Martins dropped it on his doorstep."). Accordingly, there is no basis for attributing the Martins' culpability to Rep. McDermott, *The New York Times*, or any other subsequent recipient of the unlawfully intercepted information.

B. The Decision Below Conflicts with Decisions of the Third and Other Circuits.

The decision below conflicts not only with this Court's precedents, but also with the Third Circuit's *Bartnicki* decision holding that Section 2511(1)(c) fails even intermediate scrutiny as applied "to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." 200 F.3d at 129.

There, as here, an individual intercepted and recorded a portion of a cellular telephone call on a matter of public concern. *See id.* at 113. That individual then placed the tape in the mailbox of another person, Jack Yocum, who was not involved in the underlying interception. *See id.* Yocum in turn gave the tape to various media organizations, which proceeded to broadcast or print portions of the intercepted call. *See id.*

In these circumstances, the Third Circuit held that Section 2511(1)(c) was unconstitutional as applied to either Yocum or the media organizations. As a threshold matter, the Third Circuit determined to apply intermediate scrutiny on the theory that the challenged statute is content-neutral—a determination with which Rep. McDermott obviously disagrees. *See id.* at 121-23.[7] Nevertheless, the *Bartnicki* court went on to hold—in

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[7] Contrary to the Third Circuit's assumption, content-neutral statutes are not invariably subject to intermediate scrutiny. "[T]he first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion). Thus, "the intermediate level of scrutiny [is] applicable to content-neutral restrictions *that impose an incidental burden* on speech," *Turner Broadcasting Sys. Inc. v. FCC*, 512 U.S. 622, 662 (1994) (emphasis added), but *not* to content-neutral prohibitions on speech itself. *See, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1393 (2000) (plurality opinion) (intermediate scrutiny appropriate because statute was *not* a "complete ban on expression"); *id.* at 1406 (Stevens, J., dissenting)

(continued...)

conflict with the court below—that Section 2511(1)(c) does *not* survive even intermediate scrutiny as applied in these circumstances. The Third Circuit explained that intermediate scrutiny "encompasses some balancing of the state interest and the means used to effectuate that interest." 200 F.3d at 124. The government's interest in punishing the "disclosure of intercepted material [by] those who played no part in the interception" is "indirect at best." *Id.* at 125-26. Indeed, the court noted that "[t]he United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the . . . conversation." *Id.* Balanced against the government's interest is the substantial concern that punishment would "deter significantly more speech than is necessary to serve the government's asserted interest," since "reporters may have difficulty discerning whether material they are considering publishing" has been lawfully obtained or is otherwise protected speech. *See id.* at 126-27. Given that "the [Supreme] Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights," the Third Circuit saw no reason to do otherwise in these circumstances. *See id.* at 127-28 & n.7.

Bartnicki is indistinguishable from this case. Just like Yocum, Rep. McDermott has been sued for allegedly disclosing the contents of an illegally intercepted conversation to the media. And, just like Yocum, Rep. McDermott was in no way involved in the underlying interception. Nonetheless, the D.C. Circuit held that intermediate scrutiny *is* satisfied,

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[7] (...continued)
("total suppression of protected speech" not entitled to reduced scrutiny). Since the statutes at issue here prohibit certain speech altogether, they are subject to strict scrutiny regardless of whether they are content-neutral. *See, e.g., Butterworth*, 494 U.S. at 626, 632 (applying strict scrutiny to invalidate a content-neutral statute that prohibited grand jury witnesses from disclosing their testimony—whatever its content—before that body).

while the Third Circuit held that such scrutiny *is not* satisfied. Indeed, the United States implicitly recognized the conflict between the cases by relying heavily on the decision below in its unsuccessful petition for rehearing in *Bartnicki*, and arguing that "as demonstrated by . . . the D.C. Circuit's decision in *Boehner*, there are substantial grounds for concluding, contrary to the panel majority, that [Section 2511 is] an entirely permissible exercise of Congressional authority." App. 75a. (The Third Circuit denied rehearing *en banc* in *Bartnicki* by a 6-5 margin. *See* App. 84a-85a.)

Although the Third Circuit panel majority attempted to distinguish this case from *Bartnicki* on its facts, that attempt serves only to highlight the conflict. As an initial matter, the Third Circuit stated that "[m]ost particularly, in *Boehner* . . ., all three judges emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers," as opposed to the individual defendant. 200 F.3d at 128. The court, however, immediately (and necessarily) conceded that this was no distinction at all, since "defendant Yocum in our case stands in the same position as McDermott," in that both are private individuals. *Id.*; *cf., e.g., Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972) (First Amendment does not distinguish between media and private individuals). Indeed, both Judge Randolph and Judge Sentelle emphasized below that "the press has no greater First Amendment rights than anyone else." App. 26a n.20; *see also* 37a-38a.

The Third Circuit thus fell back to the assertion that "there is an indication in *Boehner* that McDermott was more than merely an innocent conduit," as he supposedly "'entered into'" an unlawful transaction with the Martins. 200 F.3d at 128-29 (quoting App. 30a). That assertion, however, is premised on a demonstrably incorrect understanding of the record in this case. As the district court below noted, "[t]he Complaint contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime." App. 51a. Rather, the complaint alleges only that *after* receiving the tape,

Rep. McDermott said that he would *listen* to it, *see* App. 63a—*not* that he was involved in the underlying interception or entered into any conspiracy. There is simply nothing in the record here to take this case outside the Third Circuit's holding that Section 2511(1)(c) "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants *participated in or encouraged that interception*." 200 F.3d at 129 (emphasis added). The Third Circuit's refusal to acknowledge the conflict does not make it any less real.

The bottom line is this: regardless of the doctrinal pigeonhole into which this case is placed, the First Amendment simply does not allow a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously obtained that information unlawfully. On that critical point, the decision below squarely conflicts with *Bartnicki*.

And that is not the only such conflict. The *Bartnicki* court also rejected Judge Randolph's theory that a defendant's "actions in disclosing the contents of the [intercepted] conversation are properly considered 'expressive conduct' rather than speech." 200 F.3d at 120. As the Third Circuit pointed out, "[i]f the act[] of 'disclosing'. . . information do[es] not constitute speech, it is hard to imagine what does fall within that category . . . ." *Id.* The disclosure of information may well entail conduct as well as speech, but that "does not take the defendants' speech activities outside the protection of the First Amendment." *Id.* Other circuits agree that the distribution of information is protected speech, rather than unprotected conduct, for First Amendment purposes. *See, e.g., International Caucus of Labor Comms. v. City of Montgomery*, 111 F.3d 1548, 1150 (11th Cir. 1997) ("[T]he distribution of literature is a type of speech protected by the First Amendment."); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 (3d Cir. 1976) (prohibitions on "disclosure of information" are "restraints of speech"); *United Steelworkers*

of Am. v. Bagwell, 383 F.2d 492, 496 (4th Cir. 1967) ("Distribution of union literature . . . is within the first amendment's protection of freedom of speech.").

C. The Question Presented is a Recurring One of Exceptional Importance.

Above and beyond the conflicts described above, the decision below presents "important First Amendment issues" that merit this Court's review in their own right. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards" precisely because the unfettered exchange of information and ideas is vital to a free society. *See Daily Mail*, 443 U.S. at 102. Thus, this Court granted *certiorari* in *Daily Mail* and *Butterworth* in the absence of any apparent circuit conflict. *See also Lowe v. SEC*, 472 U.S. 181, 188-89 (1985) (granting *certiorari* "to consider the important constitutional question whether an injunction against the publication and distribution of petitioners' newsletter is prohibited by the First Amendment"); Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.14, at 190 (7th ed. 1993).

The suppression of truthful information is particularly dangerous where, as here, the relevant information involves apparent official misconduct by a high-ranking public official. "[T]he publication of information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment." *Butterworth*, 494 U.S. at 632. As Judge Sentelle noted, the First Amendment guarantees Americans the right to disclose truthful information of "critical public importance about, for example, some public official's accepting a bribe," regardless of whether someone else previously obtained or disclosed that information unlawfully. *See* App. 38a. Under the view embraced by the panel majority below, however, the information itself becomes "tainted" if unlawfully obtained by *anyone*, and the government is thereafter free to proscribe and punish its

disclosure by subsequent recipients wholly unconnected to the illegality.

Worse yet, the public would be deprived not only of the "tainted" information, but also of other information that a recipient "has reason to know" may be tainted. *See* § 2511(1)(c). This Court "has frequently expressed concern about the timidity and self-censorship that may result from permitting the media to be punished for publishing certain truthful information." *Bartnicki*, 200 F.3d at 127 (internal quotation omitted; citing cases). Section 2511(1)(c) would cause precisely such timidity and self-censorship by requiring recipients of information "to determine whether information provided by a source has been derived through legal means." *Peavy v. Harman*, 37 F. Supp. 2d 495, 516-17 (N.D. Tex. 1999) ("*Peavy II*"), *appeal pending* (5th Cir. Nos. 99-10272, 10303). As Judge Sentelle warned, "I do not see how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again." App. 41a.

Accordingly, as the United States emphasized in seeking rehearing *en banc* in *Bartnicki*, the question presented here is one of "exceptional importance." App. 70a. Indeed, the particular question presented by the United States there—whether Section 2511(1)(c) "violate[s] the First Amendment when applied to disclosure of illegally intercepted information about matters of 'public importance' by persons who know or have reason to know that the information was intercepted unlawfully but who were not involved in the surveillance," *id.*—is all but identical to the question presented here. *See supra* at i.

Review of that question is especially important because it is a recurring and multi-faceted one on which the lower courts plainly require guidance. In recent years, federal and state courts addressing this issue have held that: (1) strict scrutiny applies and is satisfied, *see Natoli v. Sullivan*, 606 N.Y.S.2d

504, 510 (Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (App. Div. 1994); (2) strict scrutiny applies and is not satisfied, *see Peavy II*, 37 F. Supp. 2d at 516-18; *Peavy I*, 976 F. Supp. at 539; (3) intermediate scrutiny applies and is satisfied, *see* App. 8a-13a; and (4) intermediate scrutiny applies and is not satisfied, *see Bartnicki*, 200 F.3d at 129. One court even upheld a comparable state statute under an *ad hoc* balancing test without considering the proper level of scrutiny. *See Keller v. Aymond*, 722 So. 2d 1224, 1227-30 (La. App. 1998), *cert. denied*, 120 S. Ct. 397 (1999). It is time for this Court to clarify the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. BOEHNER,

Appellant,

v.

JAMES A. McDERMOTT,

Appellee.

UNITED STATES OF AMERICA,

Intervenor for Appellant.

No. 98-7156.

Appeal from the United States District Court
for the District of Columbia
Thomas F. Hogan, District Judge, Presiding

Argued April 30, 1999.
Decided Sept. 24, 1999.

Before: GINSBURG, SENTELLE,
and RANDOLPH, Circuit Judges.

Opinion by Judge Randolph;
Opinion concurring in the judgment and in
Parts I, II.B, and II.D (except the first and last paragraphs)
of the opinion for the Court by Judge Ginsburg;
Dissent by Judge Sentelle

OPINION

RANDOLPH, Circuit Judge:

"Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. A federal statute prohibits private parties from intentionally intercepting wire, oral and electronic communications. The law also forbids

any person from disclosing the contents of such a communication, if the person knew it was illegally intercepted. Is it part of "the freedom of speech" for an individual to give a newspaper the tape recording of a cellular telephone call he received from the criminals who conducted the illegal eavesdropping? That is the ultimate question in this appeal from the district court's dismissal of a complaint brought against the individual who transferred the tape to the New York Times and other newspapers. The district court ruled that, as applied in this case, the federal prohibition on disclosure violated the First Amendment because the defendant "legally obtained" the tape recording, and because the tape contained conversations relating to matters of "public concern." The United States has intervened to defend the constitutionality of the statute.

I

John A. Boehner, a Republican member of the House of Representatives, representing the Eighth District of Ohio, brought this action against James A. McDermott, a Democratic member of the House representing the Seventh District of Washington. The following events are the focus of the complaint.[1]

On December 21, 1996, Representative Boehner participated in a conference call with members of the Republican Party leadership, including Representatives Dick Armey and Tom DeLay, and then-Speaker of the House Newt Gingrich. At the time of the conversation, Gingrich was the subject of an investigation by the House Committee on Standards of Official Conduct—the House Ethics Committee. *See In the Matter of Representative Newt Gingrich*, H.R. Rep. No. 105-1 (1997); *see also* H.R. 31, 105th Cong. (1997) (adopting the report).

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[1] Because this matter comes before the court as an appeal of the district court's grant of a motion to dismiss, we take as true the allegations made by Boehner in his complaint. *See Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1263 (D.C. Cir. 1995).

Boehner was chairman of the House Republican Conference. The participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the committee's promise not to hold a hearing.

Boehner was driving through northern Florida when he joined the conference call. He spoke from a cellular telephone in his car. John and Alice Martin, who lived in Florida, used a radio scanner to eavesdrop on the conversation. They tape recorded the call and later met with Democratic Representative Karen 's of Florida to discuss both the tape and the possibility of their receiving immunity for their illegal interception of the call.

At Thurman's suggestion, the Martins personally delivered the tape to Representative McDermott on January 8, 1997. McDermott was then the ranking Democratic member of the House Ethics Committee. The Martins' cover letter explained that the tape contained "a conference call heard over a scanner," and closed with this statement: "We understand that we will be granted immunity."

The next day, January 9, 1997, McDermott gave copies of the tape to the New York Times, the Atlanta Journal-Constitution, and Roll Call. Because the tape revealed Gingrich engaging in conduct that might have violated the terms of the agreement, it had great news value for the three newspapers, and each ran a story on the party leaders' conversation. The New York Times published its story on the front page of its January 10, 1997 edition and included a verbatim transcript of a portion of the conversation.

After the newspaper accounts appeared, the Martins publicly confessed their role in recording the conversation and admitted giving a copy of their tape to McDermott. On January 13, 1997, McDermott provided his fellow Ethics Committee members with the Martins' tape (or a copy of it) and resigned from the committee. The committee chairman, Representative Nancy Johnson, forwarded the tape to the Justice Department.

The government prosecuted the Martins for violating 18 U.S.C. §§ 2511(1)(a) and 2511(4)(b)(ii).

Under § 2511(1)(a), anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" is guilty of an offense punishable by fine or imprisonment, or both. 18 U.S.C. §§ 2511(1)(a), 2511(4). The Martins entered guilty pleas on April 23, 1997, and were each fined $500.

One year later Boehner brought this suit against McDermott, invoking the civil liability provisions of the Electronic Communications Privacy Act. *See* 18 U.S.C. § 2520. His complaint charged McDermott with violating 18 U.S.C. § 2511(1)(c):

> (1) Except as otherwise specifically provided in this chapter any person who—
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> * * *
>
> > (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
> >
> > * * *
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Claiming that McDermott had illegally disclosed the contents of the conference call, knowing it to have been

illegally intercepted, Boehner sought statutory damages of $10,000 pursuant to 18 U.S.C. § 2520(c)(2)(B).[2]

McDermott moved to dismiss the complaint, arguing that § 2511(1)(c), as applied to him, violated the free speech clause of the First Amendment. He claimed, and the district court agreed, that the First Amendment "prohibits the punishment under any of the statutes cited in the Complaint for the disclosure of truthful and lawfully obtained information on a matter of substantial public concern." Motion to Dismiss at 1.

II

A

In mounting his First Amendment defense, McDermott obviously thinks he engaged in speech, speech for which he would suffer liability in damages if § 2511(1)(c) were applied to him. What speech? A simple question, but crucial. Too bad McDermott devotes only one sentence of his brief to the answer: "Because the disclosure of information is unquestionably speech, these provisions [of federal and state law] impose a naked prohibition on speech." Brief for Appellee at 11. But those who expose private activity to public gaze are not necessarily engaging in speech, let alone "the freedom of speech." Otherwise, one might as well say the Martins were exercising their right of free speech when they personally handed over the product of their crime to McDermott; or that they would have been engaging in free

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[2] In a separate count, Boehner brought a claim under Fla. Stat. Ann. § 934.03(1)(c)—which, in relevant respects, is identical to 18 U.S.C. § 2511(1)(c). Because our analysis of the two statutes will be the same with respect to McDermott's First Amendment claim, whenever this opinion refers to the federal statute, we intend to include the state statute as well. In his motion to dismiss, McDermott also argued that the Florida statute could not apply to his conduct because his alleged actions occurred outside the state's borders. Because the district court dismissed the complaint on other grounds, it did not address this argument. *See Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *3 n. 2 (D.D.C. July 28, 1998).

speech if they had surreptitiously dropped the tape on his doorstep, or mailed it to him anonymously in a plain wrapper. Not even McDermott goes so far. *See, e.g.*, Oral Arg. Tr. at 41, 43.[3] If the Martins were not exercising their right of free speech, as McDermott seems to concede, it is difficult to see why McDermott was exercising his freedom of speech when he gave copies of their tape to the newspapers.

At one point in his brief, McDermott asserts that "[t]his is core political speech, and lies at the very heart of the First Amendment." Brief for Appellee at 45. His assertion, however, deals with the contents of the tape. The tape does indeed contain speech about political matters. But the speech is not McDermott's and § 2511(1)(c) does not render him liable for anything anyone said on the recording. As to McDermott's speech, it is safe to assume that he said something when he arranged for delivery of the tapes to the newspapers. The New York Times in fact attributed several statements to him:[4] a "Democratic Congressman hostile to Mr. Gingrich . . . insisted that he not be identified further"; the "Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida"; the Congressman "quoted them as saying it had been recorded off a radio scanner . . . about 9:45 A.M. on Dec. 21." In making these remarks McDermott was undoubtedly engaging in speech. But neither these statements, nor any other statements he may have made to the newspapers in connection with his delivery of the tape, are the basis of the complaint. McDermott's liability under

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[3] At oral argument, McDermott conceded that, on the facts alleged in the complaint, his delivery of the tapes to the newspapers brought him within § 2511(1)(c)'s prohibition against anyone who "intentionally discloses, or endeavors to disclose" the contents of an illegally intercepted communication. Oral Arg. Tr. at 38-43. Whether in this case the actual disclosure occurred only after the newspaper took possession of the tape and played it is therefore of no moment.

[4] We assume McDermott was the unnamed Congressman mentioned in the Times article. *See Edmondson & Gallagher*, 48 F.3d at 1263.

§ 2511(1)(c) rests on the truth of two allegations: that he "caused a copy of the tape" to be given to the newspapers; and that he "did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted (as the cover letter on its face disclosed)." Complaint ¶ 20. Although the circumstances of McDermott's transactions with the newspapers, including who said what to whom, may become evidence at trial, it is his conduct in delivering the tape that gives rise to his potential liability under § 2511(1)(c). McDermott's behavior in turning over the tapes doubtless conveyed a message, expressing something about him. All behavior does. But not all behavior comes within the First Amendment.

"[E]ven on the assumption that there was [some] communicative element in" McDermott's conduct, the Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The *O'Brien* framework is the proper mode of First Amendment analysis in this case. McDermott's challenge is only to the statute as it applies to his delivery of the tape to newspapers. Whether a different analysis would govern if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Parker v. Levy*, 417 U.S. 733, 756 (1974); *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *contrast Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

B

In its modern iteration, the *O'Brien* analysis applies to statutes containing generally applicable, content-neutral prohibitions on conduct that create incidental burdens on speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Section 2511(1)(c) is a statute fitting that description. It is one of several provisions constituting "a comprehensive statutory scheme dedicated to preserving personal privacy by sharply limiting the circumstances under which surveillance may be undertaken and its fruits disclosed." *Lam Lek Chong v. DEA*, 929 F.2d 729, 733 (D.C. Cir. 1991). It prohibits the disclosure of all illegally intercepted communications, without regard to the substance of the communication or the identity of the person who does the disclosing. It reveals no governmental interest in distinguishing between types of speech based on content. It neither favors nor disfavors any particular viewpoint. To the extent that the particular type of conduct § 2511(1)(c) addresses—"disclosure"—may entail constitutionally protected speech, the statute regulates it without reference to content. *See Lam Lek Chong*, 929 F.2d at 733; *see also Turner Broad.*, 512 U.S. at 642-43; *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (per curiam).

The oft-repeated test laid down in *O'Brien* is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Here, the "substantial governmental interest" "unrelated to the suppression of free expression" is evident. Section 2511(1)(c), rather than impinging on speech, as McDermott supposes, promotes the freedom of speech. Eavesdroppers destroy the privacy of conversations. The greater the threat of intrusion, the greater the inhibition on candid exchanges. Interception itself is damaging enough. But the damage to free speech is all the more severe when illegally intercepted communications may be distributed with impunity.[5] This is why § 2511 does not merely prohibit the unauthorized interception of wire, oral and electronic communications. It is why the federal statute also forbids the use and disclosure of the illegally intercepted communication.[6] It is why, in certain

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[5] *See Gelbard v. United States*, 408 U.S. 41, 52 (1972): "to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure. And, of course, Title III makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U.S.C. § 2511(1); *see* 18 U.S.C. § 2520."

[6] In addition to Florida, forty-four other states and the District of Columbia prohibit not only the interception of electronic communications, but also the disclosure of those communications by persons not acting under color of law. Most of these statutes mirror the wording of 18 U.S.C. § 2511. *See* Ala. Code §§ 13A-11-31,13A-11-35 (1994); Alaska Stat. §§ 42.20.300 to 42.20.330 (Michie 1989 & Supp. 1995); Ariz. Rev. Stat. Ann. §§ 13-3005, 13-3006 (West 1989) (limiting criminal disclosure liability to telecommunications employees and those acting in concert with them); Cal. Penal Code §§ 631, 632 (West 1999); Colo. Rev. Stat. § 18-9-303 (1986 & Supp. 1995); Conn. Gen. Stat. §§ 53a-187, 53a-188, 53a-189, 54-41r (1994) (allowing civil recovery from any unauthorized discloser, but limiting criminal penalties to telecommunications employees and those acting in concert with them); Del. Code Ann. tit. 11, § 1336 (1996); D.C. Code Ann. §§ 23-542, 23-554 (1996); Ga. Code Ann. §§ 16-11-62, 16-11-66.1 (1994); Haw. Rev. Stat. § 803-42 (1995); Idaho Code § 18-6702 (1996); 720 Ill. Comp. Stat. Ann. 5/14-2 (1993); Ind. Code Ann. § 35-45-2-4 (West 1994) (limiting criminal disclosure liability to telecommunications employees); Iowa Code §§ 808B.2, 808B.8 (1994), *as amended by* Act of Apr. 28, 1999, 1999 Iowa Legis. Serv. S.F. 309 (West); Kan. Stat. Ann. § 21-4002 (1996);

(continued...)

circumstances, the law also punishes disclosure even if the interception was itself legal, as when a law enforcement official has conducted a wiretap pursuant to a court order. *See* 18 U.S.C. § 2511(1)(e).

In all of this it is well to remember that although the "essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas," there is "a concomitant freedom not to speak publicly, which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471

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[6] (...continued)
Ky. Rev. Stat. Ann. §§ 526.020, 526.060 (Michie 1998); La. Rev. Stat. Ann. §§ 15:1303, 15:1312 (West 1992); Me. Rev. Stat. Ann. tit. 15, §§ 710, 711 (West 1998); Md. Code Ann., Cts. & Jud. Proc. § 10-402 (1998); Mass. Gen. Laws Ann. ch. 272, § 99(c) (West 1990); Mich. Comp. Laws Ann. §§ 750.539c, 750.539e, 750.539h (West 1991 & Supp. 1995); Minn. Stat. Ann. §§ 626A.02, 626A.13 (West 1998); Mo. Rev. Stat. §§ 542.402, 542.418 (1996); Mont. Code Ann. § 45-8-10 (1997); Neb. Rev. Stat. §§ 86-702, 86- 707.02 (1995); Nev. Rev. Stat. §§ 200.620, 200.630, 200.650, 200.690 (1994); N.H. Rev. Stat. Ann. § 570-A:2 (1995); N.J. Stat. Ann. §§ 2A-156A-3, 2A-156A-24 (West 1985 & Supp. 1999); N.M. Stat. Ann. §§ 30-12-14, 30-12-11 (Michie 1994); N.Y. Penal Law §§ 250.05, 250.25 (McKinney 1989 & Supp. 1995); N.C. Stat. Ann. § 15A-287 (1996); N.D. Cent. Code § 12.1-15-02 (1994); Ohio Rev. Code Ann. §§ 2933.52, 2933.65 (Banks-Baldwin 1998) (prohibiting interception and use, authorizing civil damages for interception, disclosure, and use); Okla. Stat. Ann. tit. 13, §§ 176.2 to 176.5 (West 1994); Or. Rev. Stat. §§ 165.540, 165.543 (1998); 18 Pa. Cons. Stat. Ann. §§ 5703, 5725 (West 1999); R.I. Gen. Laws § 11-35-21 (1998); Tenn. Code Ann. §§ 39-13-601 to 39-13-603 (1994); Tex. Penal Code Ann. §§ 16.02, 16.05 (West 1994); Utah Code Ann. §§ 77-23a-4, 77-23a-11 (1994); Va. Code Ann. §§ 19.2-62, 19.2-69 (Michie 1990); W. Va. Code §§ 62-1D-3, 62-1D-12 (1990); Wis. Stat. Ann. § 968.31 (West 1985 & Supp. 1999); Wyo. Stat. §§ 7-3-602, 7-3-609 (1987); *see also* Russell G. Donaldson, Annotation, *Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes*, 33 A.L.R. 4th 506, 1984 WL 263258 (1998). Arkansas does not separately prohibit the disclosure of intercepted communications, but its laws achieve a similar effect by making it a crime "to record or possess a recording of such communication." Ark. Code Ann. § 5-60-120(a) (Michie 1994).

U.S. 539, 559 (1985) (quoting with approval *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)); *see also Halperin v. Kissinger*, 606 F.2d 1192, 1199 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981) (per curiam). The freedom not to speak publicly, to speak only privately, is violated whenever an illegally intercepted conversation is revealed, and it is violated even if the person who does the revealing is not the person who did the intercepting.[7] For his part, McDermott correctly concedes that the Martins could have been punished not only for intercepting the conference call, but also for giving the tape to him. *See* Oral Arg. Tr. at 41, 43, 53. But as we have indicated, he offers no good explanation why, if he had a First Amendment right to disclose the call, the Martins did not. Comparing the Martins' conduct with McDermott's, one might rank the Martins as more culpable. Yet in terms of damage to the privacy of conversations and to the freedom of speech, McDermott's alleged actions had a far more devastating impact.

There are other substantial government interests underlying § 2511(1)(c), interests best illustrated through a hypothetical. Suppose Boehner had tape recorded his conference call.[8] Suppose as well that the Martins later break into Boehner's office, steal the tape and give it to McDermott, who then acts exactly as he is alleged to have acted here: he accepts the tape from the Martins and delivers it to the press. In the hypothetical, there is no doubt that if McDermott knew how the Martins acquired the tape, he could be prosecuted for receiving stolen property. *See* D.C. Code Ann. § 22-3832. With respect to McDermott, it is hard to see any practical constitutional

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[7] The link between the Martins and McDermott was direct. Whether someone further down the chain would have a defense similar to that suggested by *Nardone v. United States*, 308 U.S. 338, 341 (1939)—that the taint of illegality was sufficiently dissipated—is something we do not decide.

[8] Federal law does not prohibit someone who is a party to a conversation from taping it. *See* 18 U.S.C. § 2511(2)(d).

distinction between the hypothetical and the facts alleged here. In the one case the Martins steal the tape; in the other, they illegally "seize" the conversation. *See Katz v. United States*, 389 U.S. 347 (1967). In both instances, McDermott knows of the illegality. The contents of both tapes are identical; what McDermott does with the tape is the same; and in both cases McDermott knows the Martins are giving him something they acquired illegally. Receiving stolen property is punished in order to remove the incentive to steal, to dry up the market for stolen goods. *See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 93, at 692 (1972). For a similar reason—that is, "to dry up the market"—states have made distribution and possession of child pornography criminal offenses. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 760 (1982). And for the same reason Congress has forbidden the disclosure of the contents of illegally intercepted communications. The district court was quite right in thinking that without § 2511(1)(c)'s prohibition on disclosure, the government would have "no means to prevent the disclosure of private information, because criminals like the Martins can literally launder illegally intercepted information" and there would be "almost no force to deter exposure of any intercepted secret." *Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *4 (D.D.C. July 28, 1998).

What we have just written also explains why whatever incidental restriction on speech § 2511(1)(c) imposes, it is "no greater than is essential to the furtherance of that interest"—the final consideration in the *O'Brien* formulation. 391 U.S. at 377. Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties,

that is, upon those not responsible for the interception, a duty of nondisclosure.

C

As against the foregoing analysis, McDermott maintains that he "lawfully obtained" the tape recording from the Martins because he committed no offense in accepting it; that the tape contained truthful information of public concern; and that the First Amendment therefore prohibits holding him liable for handing the tape (or copies of it) over to the newspapers.[9] He believes the following "limited First Amendment principle" controls: "If a newspaper lawfully obtains truthful information about a matter of public significance, then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).[10]

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[9] It appears that McDermott, or someone acting for him, made copies of the tape. No one disputes that the Martins gave but one copy of the tape to McDermott. The New York Times, in its article of January 10, 1997, reported that it had received a tape recording of the conference call from a "Democratic Congressman" who did not wish to be identified. The complaint alleges that McDermott also gave audiotapes to two other newspapers. After the Martins held a press conference on January 13, 1997, McDermott delivered still another copy of the tape to the House Ethics Committee, which turned the tape over to the Justice Department. McDermott may also have made a transcript of the call. According to the New York Times, in its article of January 10, 1997, "a transcript of [the conference call] was made available by" the same unidentified Congressman who supplied the tape.

[10] The quotation does not fit precisely. The case before us is a civil suit for damages, not a criminal prosecution to impose punishment. Boehner makes nothing of this distinction and neither will we. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991). Also, the complaint alleges that McDermott disclosed the conversation, not that he published it. Publication of course will always amount to a disclosure, but not every disclosure may amount to the sort of publication the Supreme Court had in mind.

The district court, believing that *Florida Star* left it no other choice, reluctantly adopted McDermott's line of reasoning. Reluctantly because the court thought these decisions had forced it into an "illogical" interpretation of the First Amendment. *Boehner*, 1998 WL 436897, at *4. McDermott's theory was, the court thought, "a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes, which are designed to prevent the disclosure of private conversations." *Id.* at * 3. By accepting this theory, the district court had rendered the government powerless "to prevent disclosure of private information, because criminals like the Martins can literally launder illegally intercepted information." *Id.*

There are many reasons for disagreeing with McDermott and with the district court about the significance of *Florida Star* as applied to this case. But first the facts of *Florida Star*. A Florida statute made it unlawful to publish the name of a rape victim "in any instrument of mass communication." 491 U.S. at 526 n. 1. The Sheriff's Department in Duval County, Florida, mistakenly included a rape victim's name in its publicly available police blotter. A Florida Star reporter took down the victim's name, and the newspaper published it. The victim sued the Sheriff's Department and the newspaper for violating the statute. Before trial, the Sheriff's Department settled with the plaintiff. A jury awarded damages against the Florida Star and a state appellate court affirmed.

The Supreme Court sustained the newspaper's First Amendment attack on the statute. The Court believed the newspaper had "lawfully obtained" the rape victim's name because the government—in the form of the Sheriff's Department—had made this information available. *See id.* at 534-36. The Court then explained why there was no "need" for the state to forbid the mass media from publishing the victim's name. The government had provided the information to the media and thus could more effectively have "policed itself" to prevent dissemination of the information. *Id.* at 538. The statute contained no scienter requirement; and the press was

entitled to assume the government "considered dissemination lawful," *id.* at 539, because the information stemmed from a "government news release," *id.* at 538. And last, the statute was under-inclusive, prohibiting publication only in "instruments of mass communication," while not prohibiting revelation of the victim's identity through other means. *Id.* at 540.

A comparison of *Florida Star* with this case reveals far more significant differences than similarities. And it is critical to recognize each of those differences. The Supreme Court did not intend to declare a universal First Amendment principle in *Florida Star*. The several phrases McDermott has fastened upon are tempered, not only by other language in the opinion, but also by the context in which they were written. Throughout, the Court stresses that it meant its decision to be narrow. The state of the law in this area is "somewhat uncharted," *id.* at 531 n. 5; the "future may bring scenarios which prudence counsels our not resolving anticipatorily," *id.* at 532; the Court is following the practice of resolving "this conflict only as it arose in a discrete factual context," *id.* at 531; "[o]ur holding today is limited," *id.* at 541.

Let us now compare the statute in *Florida Star* with § 2511(1)(c). One could say, as McDermott seems to, that both provisions are alike in that both prohibit the "disclosure" of "information." But when we dig more deeply many critical differences appear. To ignore them would be to convert *Florida Star* from a narrow decision into an expansive one. Consider first exactly what the statutes forbid. The Florida statute prohibited the act of printing, publishing or broadcasting "in any instrument of mass communication." 491 U.S. at 526 n. 1 (quoting Fla. Stat. § 794.03 (1987)). The federal law is not, however, limited to those means of disclosure and it is not aimed at the press. Anyone who discloses, or endeavors to disclose, illegally intercepted communications knowing of the illegality violates § 2511(1)(c). The objectives of the laws are different too. The Florida statute sought to protect the privacy of rape victims.

See 491 U.S. at 537. The federal law seeks to protect the privacy of communications. *See, e.g., Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). In that respect, the federal law—unlike the Florida statute—advances First Amendment interests for reasons already mentioned. *See supra* [App. 9a-11a]. The Florida statute dealt with information in the government's possession; release of the information was therefore in the government's control. *See* 491 U.S. at 534-36, 538-39. The federal law deals with communications between private persons, the content of which will not be known to the government, unless it has complied with the rigorous procedures needed to obtain a court order allowing electronic surveillance for law enforcement purposes. *See* 18 U.S.C. § 2518; *see also id.* §§ 2511(2)(b)-(f), 2515-2517, 2519. The state law in *Florida Star* (and in *Daily Mail*) "defined the content of publications that would trigger liability." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991). Here, the federal prohibition on disclosure is not dependent on the content of the communication. And of greatest importance, § 2511(1)(c) prohibits disclosure of the communication only if the original interception was itself illegal and only if the person charged with unlawfully disclosing its contents knew of the illegality. *See* 18 U.S.C. § 2511(1)(c). In contrast, the Florida statute had no scienter requirement, *see Florida Star*, 491 U.S. at 539, and the government lawfully acquired the information—the victim's identity—while investigating a crime.

This last distinction must be underscored because the Supreme Court in *Florida Star* attached such great significance to it. After citing cases for the proposition that when "information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts," the Court dropped a footnote:

> The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever

> punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications*, 435 U.S. [829,] 837 [(1978)]. We have no occasion to address it here.

491 U.S. at 535 n. 8.

To understand this footnote correctly one must remember that in the newspaper business, sources provide information, but newspapers, not sources, are the publishers. Suppose a "source" breaks into an office, steals documents, gives them to a newspaper and the newspaper, knowing the documents were stolen, publishes them in violation of a state or federal law. We read footnote 8 to mean that the "*Daily Mail* principle" would not determine if the newspaper had a First Amendment right to publish the stolen documents. What takes this hypothetical case out of *Daily Mail* and *Florida Star*? The fact that the documents are the product of a crime, committed by a "source." McDermott thinks he stands in the shoes of the "newspaper" in *Florida Star*. He treats a newspaper's "publication" as the equivalent of his disclosure. Given his press analogy, the Martins played the role of McDermott's "source." It follows from footnote 8 that the "*Daily Mail* principle" and the decision in *Florida Star* do not "settle" this case.

McDermott's effort to explain away the *Florida Star* footnote is thoroughly unconvincing. He proposes that footnote 8 "simply reserved the question whether a person who discloses unlawfully acquired information is subject to punishment only for the unlawful acquisition or for both the unlawful acquisition and the disclosure." Brief for Appellee at 31. In other words, all the Court left open is the question whether the Martins could have been punished not only for intercepting the call, in violation of § 2511(1)(a), but also for giving the tape to McDermott, in violation of § 2511(1)(c). This cannot be correct. For one thing, the Court did not have before it a case

in which the published information—the rape victim's name—had been "acquired unlawfully . . . by a source"; the Sheriff's Department was the newspaper's "source" and it acquired the victim's name both lawfully and with her consent. Also, given the facts of *Florida Star*, and particularly in light of the Court's resolve to confine the opinion to the "discrete factual context" of the case, 491 U.S. at 531, the Court necessarily did not decide the question before us. For another thing, McDermott's reading of the footnote could make sense if and only if a "source" first illegally obtained information and then did the "ensuing publication." In the context of the footnote, this is farfetched indeed. Again, the newspapers' sources do not publish; the newspapers do. The point of the footnote is that regardless whether the illegality is committed by a newspaper's reporter or by a source, if the newspaper publishes the illegally obtained information, the First Amendment may not shield it from punishment. The Court came close to holding as much in *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972): no matter how great "the interest in securing the news," the First Amendment "does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to other persons."

Furthermore, if McDermott were right about the footnote, there is no explaining the Court's citation to the "Pentagon Papers" case—*New York Times Co. v. United States*, 403 U.S. 713 (1971). At the time of that decision, everyone knew that a "source" (later identified as Daniel Ellsberg, a researcher at the RAND Corporation on contract with the Department of Defense) had illegally obtained copies of classified Defense Department documents. *See generally* David Rudenstine, The Day the Presses Stopped: A History of the Pentagon Papers

Case 33-65 (1996).[11] The issue before the Court was whether enjoining the New York Times and the Washington Post from publishing the material amounted to a prior restraint in violation of the First Amendment. As the *Florida Star* footnote stated, the Court left unresolved the question whether the Post and the Times could be punished for later publishing the documents Ellsberg had illegally acquired.[12] In short,

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[11] The United States later prosecuted Ellsberg for violating the Federal Espionage Act and for theft of government property. *See generally* Rudenstine, *supra*, at 341-43. The district judge barred the prosecution after the government revealed that the "White House plumbers" had burglarized Ellsberg's psychiatrists' office and intercepted telephone conversations, in violation of the Constitution. *See id.*; *see also Russo v. Byrne*, 409 U.S. 1219 (1972) (Douglas, Circuit J., (issuing a stay against Ellsberg's prosecution); *United States v. Russo & Ellsberg*, Crim. No. 9373 (WNB) (C.D. Cal. May 11, 1973) (dismissing the prosecution because of government misconduct). Ellsberg and others later sought civil damages from the interceptors under the same provision Boehner now invokes against McDermott. *See, e.g., Ellsberg v. Mitchell*, 807 F.2d 204 (D.C. Cir. 1986); *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986); *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986).

[12] Justice White, joined by Justice Stewart, put it this way in his concurring opinion:

> The Criminal Code contains numerous provisions potentially relevant to these cases . . .. If any of the material here at issue is of [the kind described in 18 U.S.C. § 797 or § 798], the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

403 U.S. at 735-37 (White, J., concurring) (footnotes omitted); *see also id.* at 730 (Stewart, J., joined by White, J., concurring) (noting that "several [criminal laws] are of very colorable relevance to the apparent circumstances in these cases" and acknowledging the possibility of future criminal or civil proceedings); *id.* at 744-45 (Marshall, J., concurring) (noting that "equity will not enjoin the commission of a crime" and identifying two statutes under which "a good-faith prosecution could have been instituted"); *id.* at 752 (Burger, C.J., dissenting) (expressly agreeing

(continued...)

McDermott's reading of footnote 8 in *Florida Star* is flatly contradicted by the Court's citation to the Pentagon Papers case, by the Court's distinction between a source and a newspaper, and by the Court's expressed intent to confine its *Florida Star* opinion strictly to the facts of the case. Given footnote 8, McDermott is not correct in arguing that the First Amendment precludes punishing an individual for disclosing information illegally transmitted to him, so long as the individual violated no law in receiving the information. Brief for Appellee at 30.[13]

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[12] (...continued)
with Justice White's comments concerning "penal sanctions"); *id.* at 759, (Blackmun, J., dissenting) (expressing "substantial accord" with Justice White's comments concerning criminal sanctions). In dissent, Justice Harlan, joined by Chief Justice Burger and Justice Blackmun, listed among "questions [which] should have been faced"—"Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired." *Id.* at 753-54 (Harlan, J., dissenting) (citing *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C. Cir. 1967, amended 1968) (holding that plaintiffs were not entitled to a preliminary injunction)).

[13] McDermott also relies on the following passage in *Florida Star*:

> [U]nder Florida law, police reports which reveal the identity of the victim of a sexual offense are not among the matters of "public record" which the public, by law, is entitled to inspect . . .. But the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the Department apparently failed to fulfill its obligation under [the Florida statute] not to "cause or allow to be . . . published" the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful. Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step.

491 U.S. at 536. It appears to us that the Court intended to confine these remarks to information "furnished by the government." *Id.* The quoted passage follows the Court's point, made in the previous paragraph, that "depriving protection to those who rely on the government's implied

(continued...)

McDermott also misreads *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978), which the *Florida Star* footnote also cited. In that case a newspaper was indicted for publishing an article about a pending investigation of a state judge.[14] McDermott is right in describing what *Landmark* did not decide. The Court wrote: "We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Id.* But McDermott is wrong in describing what *Landmark* did decide. The Court did not, as he contends, determine that a newspaper has a First Amendment right to publish illegally acquired information. The record in *Landmark* contained no evidence regarding who supplied the newspaper with the information or how they obtained it. *See Landmark Communications, Inc. v. Commonwealth*, 233 S.E.2d 120, 123 n. 4 (Va. 1977) ("The record is silent, however, concerning the manner in which Landmark secured the information."). The Court therefore decided only that "the Commonwealth's interests advanced by the imposition of criminal sanctions [were] insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Landmark*, 435 U.S. at 838.[15]

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[13] (...continued)
representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.*

[14] The Virginia Constitution commanded that proceedings before the state Judicial Inquiry and Review Commission "shall be confidential." Va. Const. art. 6, § 10. The statutes implementing this provision made it a misdemeanor for "any person" to "divulge information" about those proceedings, Va. Code §§ 2.1-37.11,2.1-37.12 (1973), which Virginia's highest court construed to include newspaper publication. *See Landmark*, 435 U.S. at 837 n. 9.

[15] The Court flatly rejected the argument that "truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment." *Id.*

Footnote 8 of *Florida Star*, and the marked contrast between § 2511(1)(c) and the Florida rape victim statute, are enough to indicate that *Florida Star* cannot control this case. But this discussion should not end without mention of an additional basis for rejecting the district court's analysis. The Supreme Court said in *Florida Star* that its application of the *Daily Mail* principle rested on three considerations. Not one of them is present here.

The Court first pointed out that "when information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." 491 U.S. at 534. In this case, the content of the conference call was not information "entrusted to the government." It was instead—in the Supreme Court's words—"sensitive information" in "private hands" and, therefore, if the government forbids "its nonconsensual acquisition," as it has in § 2511(1)(a), "the publication of any information so acquired" is "outside the *Daily Mail* principle." *Id.* "The right to speak and publish does not," in other words, "carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

"A second consideration undergirding the *Daily Mail* principle is the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Id.* at 535.[16] That

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[16] The *Florida Star* Court described the *Daily Mail* formulation as a "synthesis of prior cases involving attempts to punish truthful publication." 491 U.S. at 533. In two of those cases—*Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)—the published information had, like the information in *Florida Star*, been placed in the public domain by the government. In *Daily Mail*, the newspapers had "obtained [the information] from witnesses, the police, and a local prosecutor," 491 U.S. at 531, and the state sought to punish the printing of the information after it had already been broadcast on the radio. *See Daily*

(continued...)

consideration too is absent here. The conference call was not "already publicly available" when McDermott gave the tape to the newspapers. Apart from the participants (and those they informed), the contents of the call were then known only to a select few, including the Martins and McDermott. And they—the Martins *and* McDermott—gained their knowledge of the call only through illegal transactions.

"And" is emphasized in the last sentence because throughout this litigation, McDermott has attempted to portray himself as an innocent. Again and again he insists that he "lawfully obtained" the tape recording from the Martins. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. The Martins violated § 2511 not once, but twice—first when they intercepted the call and second when they disclosed it to McDermott. By accepting the tape from the Martins, McDermott participated in their illegal conduct. That transaction may have involved a *quid pro quo*. When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him. One need not go so far as to say that the Martins and McDermott entered into a conspiracy, in violation of 18 U.S.C. § 371. It is enough to point out, as Boehner does, that in receiving the tape, McDermott took part in an illegal transaction. *See* Reply Brief for Appellant at 11. If he did not thereby break the law, he was at least skirting the edge.

The *Florida Star* Court's third reason for applying the "*Daily Mail* principle" was "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing" "information released, without qualification, by the government." 491 U.S. at 535-36. McDermott is not the

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[16] (...continued)
Mail, 443 U.S. at 104-05.

"media"; the government did not release this information; and it would not be out of "timidity [or] self-censorship" for someone to alert the authorities after being handed evidence of a crime by those who perpetrated the offense. It would instead be an act worthy of a responsible citizen. *See* 18 U.S.C. § 3 (accessory after the fact); 18 U.S.C. § 4 (misprision of a felony).

In short, the illegal activity of the Martins, of which McDermott was well aware when he took possession of the tape, takes McDermott's actions "outside of the *Daily Mail* principle" and the *Florida Star* line of cases. 491 U.S. at 534.[17]

Beyond those cases, one can find no firm First Amendment right to disclose information simply because the information was, in the first instance, legally acquired by the person who revealed it. For instance, a grand juror who lawfully obtains knowledge of the testimony of witnesses may not disclose that testimony to anyone else. *See* Fed. R. Crim. P. 6(e); *see In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-500 (D.C. Cir. 1998). There appears to be no constitutional difficulty with laws prohibiting the disclosure of lawfully obtained trade secrets or with laws protecting proprietary interests in performances. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577- 79 & n. 13 (1977). Congress may provide remedies for the unauthorized publication of copyrighted material even if the publisher broke no law in receiving the material. *See Harper & Row*, 471 U.S. at 555-60. In discovery, litigants lawfully acquire private information from

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[17] *Butterworth v. Smith*, 494 U.S. 624 (1990), on which McDermott also relies, held that under the First Amendment the government could not prohibit a grand jury witness from publicly disclosing his own grand jury testimony. The Court did not suggest that grand jurors, who are under a duty of confidentiality, or someone who steals grand jury transcripts, could not be punished for disclosing such testimony. While *Butterworth* might apply if the law prohibited a person not only from tape recording his own conversation, but also from disclosing the contents of his conversation, the opinion had nothing to say about McDermott's situation.

their opponents. This does not mean the First Amendment precludes a court from issuing a protective order to prevent disclosure of that information. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 36-37 (1984). Courts may enforce a reporter's promise not to publish the lawfully obtained name of a confidential informant. *See Cohen*, 501 U.S. at 669-72; *see also Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (enforcing CIA agent's employment agreement to submit his writings for prepublication review). And a law enforcement official who conducts a wiretap or a judge who authorizes the interception has no First Amendment right to disclose the contents of the intercepted call or the existence of the electronic surveillance. *United States v. Aguilar*, 515 U.S. 593, 605 (1995).[18]

One might try to distinguish these cases on the basis that in each there was some pre-existing duty not to reveal the information lawfully received. McDermott makes the attempt. In each of these cases, he says, "a person or entity obtains

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[18] This recital hardly exhausts the category of laws prohibiting disclosure of information without regard to whether the recipient violated the law in obtaining the information. For instance, lawyers may suffer suspension or disbarment for revealing client confidences. Those who rent or sell video tapes may be held liable for disclosing "personally identifiable information concerning" their customers. 18 U.S.C. § 2710. With some exceptions, employees of state motor vehicle departments may not disclose information about individuals who have received drivers' licenses or vehicle registrations. 18 U.S.C. § 2721. Under 18 U.S.C. § 794, it is an offense, punishable by death or imprisonment, for anyone intending to injure the United States to disclose to a foreign nation documents relating to our national defense. Tax return preparers are subject to civil and criminal penalties for the unauthorized disclosure of tax return information. *See* 26 U.S.C. §§ 6713, 7216; *see also* 26 U.S.C. § 6103 (imposing duty of confidentiality on IRS employees); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) ("The IRS and the office of Chief Counsel are the gatekeepers of federal tax information. Through § 6103, Congress charged these two agencies and their employees with the duty of protecting return information from disclosure to others within the federal government, and to the public at large.").

confidential information pursuant to a concomitant duty of nondisclosure, and the First Amendment does not preclude the enforcement of that duty." Brief for Appellee at 20. But this is no distinction at all. McDermott too obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c). The same was true in *Harper & Row*, the only difference being that the duty there stemmed from the copyright laws. It is true that Congressional authority to pass copyright laws is provided specifically in the Constitution (Article I, § 8) and that copyright itself serves as an "engine of free expression." *Harper & Row*, 471 U.S. at 558. But much the same may be said of § 2511: the Commerce Clause of the Constitution gave Congress the power to regulate interstate communications, and § 2511, including § 2511(1)(c), promotes free expression.

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Our dissenting colleague finds it difficult to draw any lines between McDermott's disclosure of the tape and a newspaper's publication of the contents of the illegally acquired conversation. One line, clearly drawn in this case, is the line between conduct and speech. When a newspaper publishes, it engages in speech. In each of the cases our colleague discusses—in *Cox Broadcasting*, in *Oklahoma Publishing*, in *Daily Mail*, and in *Florida Star*[19]—there was no doubt the defendant engaged in speech for which it was held liable. As explained earlier, here there is doubt, very real doubt.[20] It is

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[19] We emphasize again that in each of these cases, the information the defendant published was in the public domain, and the government was responsible for putting it there. Not so here: the conference call was not in the public domain and there was no government involvement in making it public.

[20] It is good that our dissenting colleague believes the press has no greater First Amendment rights than anyone else. The Supreme Court agrees with him. So do we. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); (continued...)

McDermott's conduct in handing over the tape to the newspapers, not anything he wrote or said, for which Boehner seeks recovery under § 2511. And because we are dealing with conduct, McDermott's case falls squarely within the Supreme Court's *O'Brien* analysis. Whether the statute would be constitutional as applied to a newspaper who published excerpts from the tape—who, in other words, engaged in speech—thus raises issues not before us.

Our dissenting colleague also thinks the statute "burdens speech based on its content—that is [§ 2511(1)(c) forbids] its publication because it contains information obtained at an earlier time in an illicit fashion." Dissenting op. at [40a]. One might as well say that prosecuting a dealer in stolen books burdens his speech on the basis of the contents of the books. That of course would be silly, but as far as content discrimination is concerned, there is no relevant difference here. We have already explained why McDermott's liability under § 2511(1)(c) does not turn on who said what during the conference call. McDermott would have violated the law if he had handed over the tape of an illegally intercepted communication between a husband and wife, or an investor and stockbroker, or a judge and law clerk. Each such conversation has in common that someone violated federal law to intercept it, but this relates to the method of acquisition not the contents of the communication. In all of this, it is important to keep McDermott's defense firmly in mind—he claims that § 2511(1)(c) unconstitutionally burdens his speech in this case. One cannot possibly evaluate that claim without making the effort to identify precisely what McDermott said, or wrote, or did to incur liability. Our dissenting colleague has not made the effort, which may be why he has fallen into the trap of equating the conversation on the tape with the contents of McDermott's speech.

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[20] (...continued)
Davis v. Schuchat, 510 F.2d 731, 734 n. 3 (D.C. Cir. 1975).

Our colleague cannot understand why Congress thought it necessary to prohibit not only the interception of communications, but also their disclosure. Dissenting op. at [41a]. The reasons are apparent. One is that prohibiting disclosure furthers the freedom of speech, and reduces the damage caused by unlawful eavesdropping. Another is that prohibiting disclosure removes an incentive for illegal interceptions. But in our colleague's judgment, disclosure should never be prohibited because illegal political espionage might uncover misdeeds that would otherwise go undetected. Dissenting op. at [38a]. This is the old ends-justifies-the-means rationale. Worse still, it is a rationale willing to sacrifice everyone's freedom not to have their private conversations revealed to the world, because some criminal at some time might illegally "seize" some politician's incriminating conversation.

Finally, our colleague believes that "the First Amendment permits the government to enjoin or punish the release of information by persons who have voluntarily entered into positions requiring them to treat the information with confidentiality." Dissenting op. at [41a]. That describes this case perfectly. McDermott "voluntarily" entered into just such a position when he accepted the illicit tape from the Martins. At that point he had a duty, if not of "confidentiality," then of nondisclosure. The duty stemmed of course from every citizen's responsibility to obey the law, of which § 2511(1)(c) is a part.

* * *

For the reasons stated, we hold that § 2511(1)(c) and the Florida statute, *see* supra note 2, are not unconstitutional as

applied in this case. Accordingly, the judgment of the district court is reversed and the case is remanded.

So ordered.

Opinion filed by Circuit Judge GINSBURG concurring in the judgment and in Parts I, II.B, and II.D (except the first and last paragraphs) of the opinion for the Court:

Although I agree that § 2511(1)(c)* is not unconstitutional as applied in this case, I find it unnecessary, in order to reach that conclusion, to address a number of the questions addressed by Judge Randolph. Specifically, I assume rather than decide that (1) McDermott's delivery of the tape to the newspapers constitutes speech protected by the First Amendment to the Constitution of the United States—a proposition that no party to the case disputes; and (2) the holding of *Florida Star*, namely, that publication of "lawfully obtain[ed,] truthful information about a matter of public significance . . . may not constitutionally [be] punish[ed] . . . absent a need to further a state interest of the highest order," 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)), applies in principle to this case. Because McDermott did not in fact lawfully obtain the tape, however, he may be punished under § 2511(1)(c), as he concedes, if the statute as applied to him survives intermediate scrutiny. I conclude it does for the reasons stated in the opinion for the Court.

Although by its terms *Florida Star* does not apply to all cases involving privately held information, *see* 491 U.S. at 534 ("To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired"), we may assume, as McDermott argues, that *Florida Star* does apply here. Therefore, there is no need to decide

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* My conclusions regarding § 2511(1)(c) apply as well to the Florida statute. *See* [App. 5a] n.2.

whether "publication," as used in footnote 8 of that case, must mean "publication by the media" and cannot mean "divulged by an individual," as it does in the context of libel law. *See* Op. at [16a-22a]. Nor need we delve into the ambiguities in the Court's dictum regarding privately held information—under what circumstances? what is "sensitive information"?—because even if *Florida Star* applies to McDermott's dissemination of the privately held information contained in the illegal wiretap, he did not lawfully acquire that information. McDermott therefore does not satisfy an essential element of the *Florida Star* test. *See* 491 U.S. at 536 ("The first inquiry is whether the newspaper 'lawfully obtain[ed] [the] information'").

Indeed, McDermott concedes that the Martins, who violated § 2511(1)(a) in acquiring the information they passed on to him, are not protected by the principle of *Florida Star*. *See* Op. at [11a]. Nonetheless, he argues that he lawfully obtained the tape from them because no federal statute prohibits receiving the contents of an illegal wiretap. That does not mean, however, that McDermott "lawfully obtain[ed]" the information. Though the Congress has not prohibited the receipt of information obtained by means of an illegal wiretap, it has prohibited the intentional and knowing disclosure of the contents of such a wiretap. Not only was the transaction in which McDermott obtained the tape therefore illegal—albeit only the Martins could be punished for effectuating it—but McDermott knew the transaction was illegal at the time he entered into it. *See* Op. at [3a, 24a]. One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not "lawfully obtain[ed]" that information in any meaningful sense.** And the Court's

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** For example, the District of Columbia "prohibits solicitation and pimping, but does not criminalize prostitution itself." *United States v. Jones*, 909 F.2d 533, 538 (D.C. Cir. 1990). Therefore, a "John" who has sex in exchange for money, but who did not solicit that sex, has apparently

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decision in *Florida Star* was not an exercise in empty formalism. *See* Op. at [15a].

McDermott points nonetheless to this passage in *Florida Star*:

> [T]hat the [Police] Department apparently failed to fulfill its obligation under [state law] not to "cause or allow to be . . . published" the name of a sexual offense victim [does not] make the newspaper's ensuing receipt of this information unlawful. Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step.

491 U.S. at 536 (emphasis in original). The Court's reference to a State "proscrib[ing] receipt of information" must be read in light of Florida's decision not to prohibit all disclosures of the name of a rape victim. *See id.* at 540 (noting that statute prohibits only publication in mass media, but "does not prohibit the spread by other means of the identities of victims of sexual offenses"). Accordingly, the transaction in which the newspaper obtained the name was not illegal *per se*; if the newspaper had not later published the name, the police department would have violated no law. By contrast, the Congress prohibited the transaction in which McDermott obtained the tape, without regard to whether its contents were subsequently published as a result.

In any event, as noted in the opinion for the Court at 474 n.13, the remarks upon which McDermott relies are apparently confined to information furnished by the Government. The Court recognized in *Florida Star* that when information is in the hands of the Government "a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." 491 U.S. at 534. When sensitive information is in private hands,

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** (...continued)
violated no law. Only the most formal minded, however, would describe that sex as having been lawfully obtained.

however, the same cannot be said; the Government has at once less power to prevent nonconsensual acquisition of the information and more need to prohibit its subsequent dissemination, whether by the thief or by one such as McDermott who received it from the thief. *Cf. id.*

In sum, nothing in *Florida Star* requires us to accept McDermott's claim that he "lawfully obtain[ed]" the tape simply because no statute prohibited his receiving it. Nor does McDermott provide us with any reason to extend *Florida Star* in a manner that, as the district court put it, permits "a criminal [to] launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins." *Boehner v. McDermott*, No. Civ. 98-594, 1998 WL 436897, at *4 (D.D.C. July 28, 1998). I therefore conclude only that one does not "lawfully obtain [ ]," within the intendment of that phrase in *Florida Star*, information acquired in a transaction one knows at the time to be illegal. *See United States v. Riggs*, 743 F. Supp. 556, 559 (N.D. Ill. 1990) (criminal defendant who "did not actually steal the [information, but] was completely aware that it was stolen when he received it" did not "lawfully obtain[ ]" it).

McDermott concedes, and both Boehner and the Government agree, that if *Florida Star* does not require the application of strict scrutiny in this case, then we should apply at most intermediate scrutiny. I agree the statute passes that test for the reasons given in the opinion for the Court at [8a-13a].

SENTELLE, Circuit Judge, dissenting:

"Hard cases make bad law," is a cliche. Phrases become cliches through much repetition. Much repetition sometimes results from the inherent truth in the phrase much repeated. I fear that by not making the hard choice, the court today once again proves that hard cases still make bad law.

A statute of the United States makes it a felony for anyone to "intentionally intercept[ ] . . . any wire, oral, or electronic

communication . . .." 18 U.S.C. § 2511(1)(a) (1994).[1] Further subsections of the same act render it felonious to "intentionally disclose[ ] . . . to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of" such communication; or to "intentionally use [ ] the contents" of any such intercepted communication. 18 U.S.C. § 2511(1)(c)-(d) (1994). On the undisputed record before us, Alice and John Martin committed at least two and probably three of the felonies created by this Act of Congress. Knowing of these felonies, a Member of the Congress of the United States, the elected representative of his people, the sworn servant of the law, dealt with the felons, received from them their feloniously obtained communications, and converted it to his own use. He obtained these communications not for the purpose of disclosing the felonies or assisting in the enforcement of law, but solely for the purpose of using the contents of the communications in the pursuit of the politics of personal destruction. To compound the wrong, this was not just any congressman, but the co-chair of the House Ethics Committee. In other words, a public official charged with the oversight of the ethics of his colleagues willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing. Protecting such an official in such an act cannot be an easy thing to do. Nonetheless, it is, I think, that hard task that the Constitution compels us to undertake.

The first element of the dispute between the parties, and perhaps the decisive one, is the level of scrutiny applicable to

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[1] Though the litigation before us concerns also Florida statutes, *see* Fla. Stat. Ann. §§ 934.03(1)(c) & 934.10 (West 1996), these statutes are patterned after the federal statute and do not differ from it in any constitutionally significant way. Therefore, for simplicity I will direct the discussion in my dissent to the federal statute, intending the reasoning to apply as to both.

a constitutional review of the statutes. McDermott contends, and I agree, that this case is controlled by a line of Supreme Court cases dealing with various gradations of the question: Under what circumstances may state officials constitutionally punish publication of information?[2] As I read those cases, the answer is that the state may do so, if at all, only when the regulation survives a test of strict scrutiny—it must "further a state interest of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

The line of relevant Supreme Court cases begins with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox Broadcasting*, the Supreme Court reviewed a judgment in favor of the family of a rape-murder victim against a broadcast corporation which had published the name of the victim in violation of a Georgia statute, Ga. Code Ann. § 26-9901 (1972), which made it a misdemeanor to publish or broadcast the name or identity of a rape victim. Although the Georgia courts vacillated between reliance on the statute and common law tort theories "'for the invasion of the . . . right of privacy, or for the tort of public disclosure,'" in the end the Georgia Supreme Court did pass on the constitutionality of the statute and sustained it as a "'legitimate limitation on the right of freedom of expression contained in the First Amendment.'" 420 U.S. at 474, 475 (quoting *Cox Broadcasting Corp. v. Cohn*, 200 S.E.2d 127 (Ga. 1973)). The high court, noting that the broadcasting company had obtained the published information from public records, declared itself "reluctant to

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[2] While I refer throughout this opinion to punishment, for First Amendment purposes I consider the term to include civil damage provisions. As the Supreme Court noted in *New York Times Co. v. Sullivan*, "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. 254, 277 (1964) (footnote and citation omitted). Similarly, the discussions of prohibition of publishing included in some of the cases which follow apply to post-publication punishment as well as to prior restraint.

embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man." *Id.* at 496. Then, in an opinion narrowed to the issue most squarely before it, the Court held that "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id. Cox Broadcasting* thus left open the question of the state's ability to impose liability for publishing information not released to the public in official court records.

Two years after *Cox Broadcasting*, in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the Supreme Court reached the same result as to information not released in public records, but otherwise publicly available. Several reporters, including those employed by the petitioner company, had been present in the courtroom during the hearing of an eleven-year-old boy charged with second degree murder. The district court of Oklahoma County enjoined members of the news media from "'publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child'" in coverage of pending juvenile court proceedings. *Id.* at 308 (quoting pretrial order). Citing *Cox Broadcasting*, as well as *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), as compelling its result, the Supreme Court held that "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact opened to the public." *Id.* at 310. The respondent had attempted to distinguish *Cox Broadcasting* on the basis that a state statute provided that juvenile hearings would be closed unless the court specifically opened them to the public, and that the record did not reflect a specific opening in the instant case. The Supreme Court found that this made no difference, but held that the critical fact was that the information published, that is "[t]he name and picture of the juvenile" were "'publicly revealed in connection with the prosecution of the crime[.]'" *Id.* at 311 (quoting *Cox*

Broadcasting, 420 U.S. at 471). While *Oklahoma Publishing*, like *Cox Broadcasting*, is still not factually identical to the instant case, it moves one step further toward compelling the result sought by McDermott.

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), goes yet another step. That case involved the publication of the identity of a juvenile offender obtained by reporters lawfully monitoring a police scanner. The reporters were indicted under a statute, W. Va. Code § 49-7-3 (1976), making it unlawful to knowingly publish the name of a juvenile involved in a juvenile court proceeding. The United States Supreme Court upheld the West Virginia Supreme Court decision prohibiting prosecution of the indictment on constitutional grounds. The Supreme Court expressly declared its holding a narrow one. Proclaiming that there was "no issue . . . of unlawful press access to confidential judicial proceedings, [and] no issue . . . of privacy or prejudicial pretrial publicity," *id.* at 105 (citation omitted), it declared that "[a]t issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." *Id.* at 105-06 (footnote omitted). In *Cox Broadcasting* and *Oklahoma Publishing*, the information sought to be suppressed was released by the court itself, either in public record or by opening access to the public. In *Daily Mail*, the information came from a scanner, but it was lawfully obtained. The holding was narrow one, but it moved narrowly toward encompassing the protection sought by McDermott today.

Closer still comes *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, a woman referred to by her initials, BJF, had been robbed and sexually assaulted by an unknown assailant. The investigating law enforcement department prepared and placed in its pressroom an incident report identifying her by her full name. Employees of the Florida Star newspaper obtained the report and published an account of the sexual assault, including her name, in violation of a Florida statute which "ma[de] it unlawful to 'print, publish, or broadcast . . . in any instrument of mass communication' the

name of the victim of a sexual offense." *Florida Star*, 491 U.S. at 526 (quoting Fla. Stat. § 794.03 (1987)) (footnote omitted). BJF sued civilly, relying on the statute for a standard of negligence per se. She obtained a judgment which stood through the state appellate process. The newspaper appealed to the United States Supreme Court arguing that imposing civil liability on the newspaper, pursuant to the statute, violated the First Amendment. The Supreme Court agreed.

The Supreme Court in *Florida Star* recognized that it had articulated in *Daily Mail* a principle derived from a synthesis of its prior cases: "'[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103). Thus, the Supreme Court made it plain that the fact of constitutional significance in *Cox Broadcasting*, *Oklahoma Publishing* and *Daily Mail* was not that the publishers in those cases had obtained the information at issue from public record or public hearings, or publicly available communications from official sources, but that they had lawfully obtained the information. Even in *Florida Star*, the Court expressly limited the scope of its ruling, holding: "only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . .." 491 U.S. at 541. Because I believe this holding of the Supreme Court instructs our decision on the facts before us, I would hold that 18 U.S.C. § 2511 cannot constitutionally be applied to penalize McDermott's publication of the contents of the unlawfully intercepted communication.

I concede at the outset that there are distinctions between our case and the cases in the *Cox Broadcasting-Florida Star* line. However, I think none of the distinctions permits a difference in result. First, I think it is of no constitutional significance that the holding in *Florida Star* expressly covered the situation "where a newspaper publishes truthful information," while

McDermott is not a newspaper. I have never believed that the First Amendment protection of "the freedom . . . of the press," afforded greater protection to professional publishers than it does to anyone who owns a typewriter, or for that matter than its protection of "the freedom of speech" affords those who communicate without writing it down. Indeed, it is safe to say that when the Framers of the Constitution used the expression "the press, they did not envision the large, corporate newspaper and television establishments of our modern world," but rather, "refer[red] to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring). Therefore, as the court holds today that the state can punish the release by McDermott based on the manner in which his source obtained that information, in a later day the state can burden the publishers of newspapers and the broadcasters of television and radio on the same basis.

I can envision felonious eavesdroppers like the Martins in this case obtaining not marginally embarrassing information about congressmen but information of critical public importance about, for example, some public official's accepting a bribe or committing perjury or obstruction of justice. Even if those hypothetical felons dumped information of that critical nature not into the hands of politicians but of a newspaper publisher or a television news network, the public could never know of the wrongdoing, because under today's ruling, those news media would be barred from further publication of that information. Therefore, I cannot think that the identity of the communicator can be a distinction of difference.

Judge Randolph's repeated attempt to distinguish between "newspapers" on the one hand and "sources" (apparently meaning all those who are not newspapers but might communicate information to a newspaper) on the other is without substance or force. His attempt to extend to newspapers some First Amendment protection not available to all those others who might communicate by stating that

"sources do not publish; the newspapers do," creates a hierarchy of First Amendment protection for a publishing aristocracy nowhere suggested in the Amendment, its history, or the cases applying it. As I noted above, the Framers' use of the expression "the press" does not connote a protected entity, but rather a protected activity. *See McIntyre*, 514 U.S. at 360, (Thomas, J., concurring). The First Amendment protections of speech and press extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources.

Judge Randolph's further attempt to pass off what McDermott did as unprotected conduct rather than protected speech is likewise unconvincing. Contrary to Judge Randolph's essential position, it was not McDermott's "conduct in delivering the tape that gives rise to his potential liability under § 2511(1)(c)." Maj. Op. at [7a]. What made his conduct punishable under the statute was the information communicated on the tapes. He could have provided the two newspapers with all the tapes in Washington on a given day and incurred no liability but for the speech contained on the tapes. Indeed, the majority's hypothetical concerning the Martins breaking into Boehner's office stealing a tape and giving it to McDermott illustrates the weakness of the majority's position, not its strength. Had the Martins broken into the office and stolen such a tape and given it to McDermott, he would have received stolen property without regard to its contents. Had he then copied its contents to other tapes and passed those copies off to *The New York Times* and *The Washington Post*, he would have incurred no liability under 18 U.S.C. § 2511, nor would he have aggravated his crime of receiving stolen property. What he is being punished for here is not conduct dependent upon the nature or origin of the tapes; it is speech dependent upon the nature of the contents.

Next, and of somewhat greater persuasion, is the distinction that the information was unlawfully obtained somewhere in the chain. That is to say, the *Florida Star* Court limited its holding

to truthful information, lawfully obtained. Indeed, the Court in *Florida Star* expressly reserved "the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star*, 491 U.S. at 535 n. 8 (additional emphasis added) (noting further that "[t]his issue was raised but not definitively resolved in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications*, 435 U.S. at 837."). That is the question. The second half of that question is the one we must answer today. Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain? I say not. This separates me from the majority.

As the Court held in *Florida Star*, "punishment may lawfully be imposed, if at all" upon the publisher of truthful information, lawfully obtained, "only when narrowly tailored to a state interest of the highest order . . .." 491 U.S. at 541. The Supreme Court has elsewhere described "the 'now settled approach' that state regulations 'imposing severe burdens on speech . . . [must] be narrowly tailored to serve a compelling state interest.'" *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 642 n. 12 (1999) (internal quotations and punctuation omitted) (quoting Thomas, J., concurring).

Otherwise put, the statutes before us burden speech based on its content—that is they forbid its publication because it contains information obtained at an earlier time in an illicit fashion. It is established Supreme Court law that when the state "establishes a financial disincentive to . . . publish works with a particular content . . . 'the State must show that its regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end.'" *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 118 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland*,

481 U.S. 221, 231 (1987)). I will not dispute that the protection of the privacy of electronic communication is a compelling state interest. I will concede for purposes of the present case that punishment of an unlawful interceptor, both criminally and by the allowance of civil damages, may well be sufficiently narrowly tailored to survive even the strict scrutiny required here. I do not, however, see that either the United States or the State of Florida has established that an undifferentiated burden on the speech of anyone who acquires the information contained in the communication from the unlawful interceptor is necessary to accomplish the state's legitimate goal or narrowly tailored to serve that end. I do not see how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again. Not only is this not narrow tailoring, this is not tailoring of any sort. As I recognized above, we are not squarely within the language of *Florida Star*. I think we must answer the question reserved in that decision, and I think we must answer it against the burdening of publication.

Although appellant offers other distinctions from the reasoning of *Florida Star*, I find none compelling, or worth more than passing mention. It is true, as appellant and the United States as intervenor argue, that the Supreme Court has held that the First Amendment permits the government to enjoin or punish the release of information by persons who have voluntarily entered into positions requiring them to treat that information with confidentiality. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (upholding constructive trust against all profits of the publication of truthful information of public importance lawfully obtained through petitioner's employment at the CIA, where he had contracted to keep the same confidential); *United States v. Aguilar*, 515 U.S. 593 (1995) (allowing punishment of a federal judge who disclosed sensitive information concerning statutorily authorized wiretap); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)

(upholding restrictions on disclosure of otherwise confidential information obtained by court order in civil discovery). Appellant and intervenor argue that McDermott can be punished for his disclosure because of his having, in their view, obtained the information at issue in his capacity as a member of the House Ethics Committee. I cannot agree. McDermott did not in fact obtain the information in his official capacity. The felons who communicated it to him were not looking for him to use his official ethical capacity but rather his unofficial political capacity to disseminate their unlawfully obtained information. It may well be the case that had he obtained the same information, for example, by Committee subpoena, he could not have lawfully disclosed it and his disclosure would not be constitutionally protected. Indeed, that is perhaps more likely than not. But those are not the facts before us.

Conclusion

For the reasons set forth above, I would uphold the judgment of the district court and I respectfully dissent from the decision of the court to the contrary.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. BOEHNER,

Appellant,

v.

JAMES A. McDERMOTT,

Appellee.

UNITED STATES OF AMERICA,

Intervenor for Appellant.

No. 98-7156.
98cv00594
September Term, 1999

Filed December 28, 1999

Before: Ginsburg, Sentelle, and Randolph, Circuit Judges.

ORDER

Upon consideration of appellee's petition for rehearing filed November 5, 1999, and of the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. BOEHNER,

Appellant,

v.

JAMES A. McDERMOTT,

Appellee.

UNITED STATES OF AMERICA,

Intervenor for Appellant.

No. 98-7156.
98cv00594

September Term, 1999
Filed December 28, 1999

Before: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Appellee's petition for rehearing en banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Sentelle and Tatel would grant the petition for rehearing *en banc*.

Circuit Judge Garland did not participate in this matter.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. MCDERMOTT,

Defendant.

Civ. No. 98-594 (TFH)

Filed July 28, 1998

MEMORANDUM OPINION

Pending before the Court is defendant's motion to dismiss The Court held a hearing on this motion on July 17, 1998. After considering the arguments made by each party in pleadings and at the hearing, the Court will grant defendant's motion.

I Background

This case arises out of the unfortunate acrimony, absence of civility, and shortage of honor, that pervades the partisan sniping between some members of Congress and their supporters. Plaintiff John Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio, who serves as the Chairman of the House Republican Conference. Defendant James McDermott is Democratic member of the House, representing the Seventh District of Washington. Rep. McDermott had served as the ranking Democrat on the House Committee on Standards of Official Conduct (The "House Ethics Committee"), although he resigned that post in the maelstrom that underlies this lawsuit.

The origins of this case lie in a conference call between several House Republican leaders, on December 21, 1996,

during which the Congressmen discussed potential responses to the House Ethics Committee probe of House Speaker Newt Gingrich. Engaged in the conversation were, among others, Speaker Gingrich, Rep. Richard Armey, and plaintiff, who was participating from Florida. Plaintiff participated in the call from a restaurant parking lot, and he participated via a cellular telephone.[1]

A Florida couple, Alice and John Martin, were monitoring the police scanner in their car—allegedly while tailing plaintiff's automobile—and intercepted and taped plaintiff's cellular transmission. After determining that the content of the transmission could be damaging to House Republicans, the Martins delivered a tape of the conversation to the office of their representative, Kay Thurman, a Democrat. In January 1997, Rep. Thurman discussed the tape with aides to Rep. David Bonior, a Democrat and Minority Whip of the House; shortly thereafter, Rep. Thurman advised the Martins to deliver a copy of the tape to defendant.

On January 8, 1997, while in Washington for the swearing-in of a new Democratic member of Congress, the Martins delivered a copy to defendant's office, along with a letter in which they explained the origins of the tape. In that same letter, the Martins expressed their understanding, supposedly derived from Rep. Thurman, that defendant would arrange for them to receive immunity from criminal prosecution. The Martins did not deliver copies to any other members of the House Ethics Committee. Rep. McDermott accepted the tape and the letter. Sometime before January 10, 1997, his office gave copies of the tape to at least three newspapers—*The New*

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[1] Defendant seeks dismissal under Federal Rule of Civil Procedure 12, so the Court must accept the facts alleged in the Complaint as true. *See Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). Because the Court has only these facts before it, and because it must accept them as true for purposes of this motion, the Court bases its factual summary on the allegations contained in plaintiff's Complaint. The summary is only of alleged facts, and does not represent any factual finding by the Court.

York Times, *The Atlanta Journal-Constitution*, and *Roll Call*. *The New York Times* broke its story on the front page of its January 10, 1997, edition.

On January 13, 1997, the Martins called a press conference, at which they asserted that they had intercepted plaintiff's conversation and delivered a tape of the conversation to defendant's office. Only after the Martins' press conference did defendant finally deliver copies of the taped conversation to other members of the House Ethics Committee. Defendant resigned from the Committee on the same day. Upon receiving her copy of the tape, Rep. Nancy L. Johnson, a Republican and Chair of the House Ethics Committee, delivered a copy to the United States Department of Justice.

The Justice Department investigated the matter, and the U.S. Attorney charged the Martins with misdemeanor unlawful interception of a cellular telephone call, in violation of 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii). Each Martin pled guilty on April 23, 1997, and each was eventually fined $500 for the offense. Although plaintiff pressed for stiffer prosecution, no further charges have been brought against the Martins, or against anyone else. The Department of Justice issued a press release, stating that stiffer prosecution was unwarranted, because the Martins did not seek to use the intercepted conversation for commercial purposes.

In February 1998, plaintiff sought and received authorization from the Federal Election Commission to use campaign funds to finance a civil lawsuit. The Commission concluded that the finance arrangement was justified because the situation "resulted directly from the pursuit of [plaintiff's] duties as a federal officeholder." Federal Election Commission Advisory Opinion 1997-27, Feb. 23, 1998, at 3. The FEC further concluded that interest in the conversation derived solely from the participants and subject matter involved, in which plaintiff was embroiled only because of his office. *Id.* Therefore, since the lawsuit was a public matter, and since plaintiff would not

receive any financial benefit himself, the FEC advised plaintiff to use campaign funds to launch the suit.

Plaintiff filed his Complaint with the Court on March 9, 1998. The Complaint alleges that defendant knowingly disclosed an unlawfully intercepted communication, in violation of the federal wiretapping statute. 18 U.S.C. §§ 2511(c), 2520. It also alleges that defendant violated the Florida wiretapping statute, which is patterned after the federal statute. Fla. Stat. §§ 934.03(c), 934.10.

Defendant has moved to dismiss the Complaint under Rule 12, for failure to state a claim.

II Motion to Dismiss

A motion to dismiss is appropriate only if it is evident that no relief could be granted under any set of facts that could be proven to support the allegations made by the plaintiff in the complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Martin v.. Ezeagu*, 816 F. Supp. 20, 23 (D.D.C. 1993). In evaluating a motion to dismiss, the Court must construe the complaint in the light most favorable to plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler v.. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

III Discussion

Plaintiff's Complaint contains two counts—one count each for violations of federal and Florida state statutes. Federal law prohibits the intentional disclosure of "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(c). The Florida statute contains almost exactly the same language. Fla. Stat. §§ 934.03(c). The federal and state statutes also confer a civil cause of action on anyone whose communication is "intercepted, disclosed, or intentionally used" in violation of the chapter. 18 U.S.C. § 2520(a). *See also* Fla. Stat.

§§ 934.10(1). The statutes provide for "such relief as may be appropriate," including equitable relief, compensatory, statutory, and punitive damages, and attorneys' fees. 18 U.S.C. § 2520(a), (b), (c); Fla. Stat. § 934.10(1).

There is no real dispute that plaintiff has stated a claim for liability under the terms of these statutes. The Martins unlawfully intercepted the cellular communication, in violation of 18 U.S.C. § 2511(a) and Fla. Stat. §§ 934.03(a), and they have been convicted for doing so. Plaintiff's Complaint alleges that defendant knew or should have known that the Martins' tape was illegally acquired. The Complaint also alleges that defendant disclosed the contents of the tape, even though he knew of its illicit origin. Therefore, plaintiff has stated a claim that defendant violated § 2511(c) and § 934.03(c), and he has stated a claim for civil liability under § 2520 and § 934.10.

Defendant argues, however, that the First Amendment precludes a finding of liability against him.[2] He asserts that the government may not restrict individuals from disclosing truthful information about a matter of public significance that is lawfully obtained, absent a need to further a state interest of the highest order. *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). Thus, defendant argues that this restriction on his exercise of free speech must be examined under a standard of strict scrutiny, and that the government interests are insufficient to withstand that scrutiny.

Defendant's argument can be divided into three parts.[3] First, the Court must determine whether the taped conversation was "lawfully obtained." Second, the Court must determine the

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[2] Defendant also argues that the Florida statute cannot apply to him, because it does not apply to actions that occurred outside Florida's borders. Because the Court will dismiss both counts on First Amendment grounds, it need not address this argument.

[3] Because the federal and Florida statutes are, for all relevant purposes, identical, the Court will not distinguish between them in its analysis.

level of scrutiny that applies to the statutes' restriction on defendant's speech. Finally, the Court must determine whether the government's interests at stake in this case are sufficient to overcome the applicable level of scrutiny.

A. Defendant's Access to Taped Conversation

Defendant argues that strict scrutiny applies to information that is "lawfully obtained;" therefore, the Court must determine whether the tape of Rep. Boehner's cellular conversation meets that description. There is no debate that, in the Martins' hands, it was not lawfully obtained—the Martins have each pled guilty to unlawfully intercepting the conversation.

Rep. McDermott argues, however, that the statute cannot and does not impute the Martins' criminal behavior to him. The Complaint contains no allegation that defendant directed the Martins' actions, or that he was otherwise complicit in their crime. Furthermore, although plaintiff alleges that defendant was aware of the tape's origin, he does not allege that defendant was aware of the tape's existence until the Martins dropped it on his doorstep.

Rep. McDermott argues that, while others may have unlawfully obtained the tape, his acquisition itself was itself lawful, and therefore that the tape was lawfully obtained in his hands.[4] Defendant's theory is a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes, which are designed to prevent the disclosure of private conversations. Under defendant's theory, the state has no

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[4] Rep. McDermott also suggests, but does not wholeheartedly pursue, and alternate theory, based on the Speech and Debate Clause of the Constitution. Pursuant to that clause, a member of Congress may use any material, even if illegally obtained, for purposes consistent with his legislative duties. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 417 (D.C. Cir. 1995) (Use of stolen documents by subcommittee is privileged). Because the Court finds that defendant "lawfully obtained" the taped conversation, it need not reach this argument, although it is highly suspect that defendant's disclosure of the tape to the press, in the pursuit of partisan gain, can be considered a purpose consistent with his legislative duties.

means to prevent disclosure of private information, because criminals like the Martins can literally launder illegally intercepted information. Pursuant to defendant's theory, a criminal may steal a conversation and give it to someone else, who could then disseminate the information with impunity. Given the almost laughable sentence imposed upon the Martin's for the initial crime, there remains almost no force to deter exposure of any intercepted secret; unless illicit recordings are considered unlawfully obtained in the hands of persons other than the initial eavesdroppers and their conspirators, the effect of the statute is diluted into nothingness.

While defendant's actions and arguments lay siege to the protections against illicit wiretapping that Congress and the Florida legislatures have erected, however, defendant has successfully located and exploited the loopholes in those protections. The federal and state statutes give no indication that the taped conversation is considered unlawfully obtained by defendant. Although the wiretap statutes prohibit the Martin's interception, and the Martin's disclosure of the tape to Reps. Thurman and McDermott, they do not prohibit Rep. McDermott's receipt of the tape. Because defendant did not break any laws in taking possession of the tape, he lawfully obtained that information, in a literal sense.

Similarly, the relevant caselaw seems to suggest that information not illegally acquired is lawfully obtained, even though its source may have obtained it illegally. For example, in the *Florida Star* case, the Duval County Sheriff's Department inadvertently published the name of a rape victim on a public blotter sheet, even though a state statute prohibited publication of such information. The police department was unquestionably liable for breaking the law, and it eventually settled a suit against it; however, the Supreme Court held that newspapers publishing the name were not liable. In holding the papers free from liability, the Court held that the information taken off the police blotter, to which the press had

lawful access, was lawfully obtained by the newspapers. *Florida Star*, 491 U.S. at 534.

Although the situation in the present case is somewhat different from *Florida Star*—for example, Rep. McDermott obtained his information from a private source, which had stolen it, not from the government, which had inadvertently released it—neither statute nor caselaw[5] provides substantial basis to conclude that defendant unlawfully obtained the taped conversation.

The wiretap statutes appear to contemplate that the taped conversation in this case was unlawfully obtained, since it was stolen in a most unscrupulous, underhanded fashion. Logic suggests that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins. The First Amendment caselaw does not seem to adopt this logic, however, and it suggests that information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it. Although the Court finds this interpretation illogical, and, even worse, suspects that it effectively undermines the protection that wiretap statutes supposedly afford, the Court is bound to accept and follow it;

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[5] Plaintiff argues that *New York Times Co. v. United States*, 403 U.S. 713 (1971) supports his contention that this information was unlawfully obtained. In that case, which concerned the Pentagon Papers, the Times published sensitive documents stolen by Daniel Elsberg. While the Court refused to erect a prepublication barrier against disclosure, four justices suggested that the newspaper might later be held liable for publishing the illicit documents. *New York Times*, 403 U.S. at 730, 736-37, 745, 752 (White, J., joined by Stewart, J., concurring, Marshall, J., concurring, Burger, C.J., dissenting). Thus, these statements suggest that the documents might be considered unlawfully obtained by the Times, even though the paper itself did not steal them. However, the justices' observations, though instructive, were made in dicta, and no more solid precedent has been set, since the newspapers were never sued or prosecuted on this theory. Therefore, the Court does not find that these statements are sufficient to overcome the more established inferences created under *Florida Star*.

thus, plaintiff has not pled facts to suggest that the stolen conversation was unlawfully obtained in defendant's hands.

B. Standard of Scrutiny

While the federal and state statutes clearly prohibit defendant's actions, at least as those actions are alleged in plaintiff's Complaint, defendant argues that this prohibition violates the First Amendment's protections for free exercise of speech. Defendant's argument demands scrutiny of these wiretap statutes, at least as applied in this case, but the parties dispute the level of scrutiny appropriate for this case.

The lead authority, discussed by both parties, on this issue is *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In that case, the Supreme Court held that a newspaper was not liable for publishing the name of a rape victim, which was inadvertently released to the press by the police, even though such publication was prohibited by statute. The Court analyzed the statute under the strict principle that the First Amendment prevents sanction for publishing truthful, lawfully acquired, information of public significance, absent a state interest of the highest order. *Florida Star*, 491 U.S. at 533. Pursuant to that strict scrutiny, the Court held that the statute could not punish the newspaper for its actions.

The Supreme Court has adopted this strict standard in several other cases involving illegal disclosure of lawfully obtained information. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) the Court vacated a civil damage award against a station that broadcast the name of a rape murder victim, which it had lawfully obtained from public courthouse records. In *Oklahoma Publishing Co. v. Oklahoma County*, 430 U.S. 308 (1977), the Court refused to enjoin publication of the name and photograph of an 11-year old boy, when the paper had obtained the information at a public juvenile proceeding. Finally, in *Smith v. Daily Mail*, 443 U.S. 97 (1979), the Court vacated the indictment of two newspapers for publishing the name of a juvenile offender, which they learned while legally monitoring a police band radio frequency. In

each of these cases, the Court applied strict scrutiny to restrictions on disclosure of truthful, lawfully acquired information.

Plaintiff cites several cases in which restrictions on disclosure of truthful, lawfully obtained information were subjected to a diminished scrutiny, and in which punishments for that disclosure were upheld. In *United States v. Aguilar*, 515 U.S. 593 (1995) the Court upheld the conviction of a federal judge, who disclosed the existence of a wiretap to the object of the surveillance, in violation of federal law. In that case, there was no question that the judge had lawfully obtained the information, or that the information was true, but his punishment was affirmed under somewhat forgiving scrutiny. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Court upheld a protective order that prohibited a litigant from disclosing information acquired in discovery, even though the litigant lawfully obtained the information. 467 U.S. at 32-34. In *Snepp v. United States*, 444 U.S. 507 (1980), the Court upheld a judgment against a former CIA agent, who wrote a book and disclosed secrets that he had acquired, lawfully, on the job. Finally, in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court upheld a judgment against a newspaper that printed the identity of a confidential source, to whom it had promised anonymity. Each of these cases involved the restriction of information that was truthful, lawfully acquired, and of public interest, and in each case, the Court analyzed the case under a diminished standard of scrutiny.

The cases cited by plaintiff are easily distinguished from the present case however, and from the general principle announced in *Florida Star* and *Daily Mail*. In each of plaintiff's examples, information was lawfully obtained only pursuant to a duty not to disclose; thus, in each case, the statute at issue merely enforced a pre-existing, independent prohibition against disclosure, without which the information could not have been lawfully obtained. For example, Judge Aguilar could not have acquired his wiretap information

without taking his oath of office, which precluded disclosure, and Snepp acquired his secrets only through his employment with the CIA. Similarly, the litigants in *Seattle Times* voluntarily assumed a duty not to disclose information acquired during discovery, and the newspaper in *Cohen* acquired the name, and statements, of its confidential source only after promising anonymity. In none of these cases did the relevant statute itself create any restriction against disclosure; each statute merely enforced a duty that was already there, independently.

In contrast, the present case, like the *Florida Star* line of cases, involves no such independent duty not to disclose information; the restriction on disclosure derives solely from the federal and state statutes themselves. Thus, the standard of *Florida Star* is better applied than that of *Aguilar*, and the other cases urged by plaintiff.

In the present case, there is no dispute that defendant disclosed only information that was truthful and of public interest, and, as the Court has discussed above, defendant lawfully obtained the information. Therefore, following *Florida Star*, the Court must examine the application of the wiretap statutes with strict scrutiny.[6]

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[6] Only one other district court has considered the application of 18 U.S.C. § 2510 to a situation like the present one. In *Peavy v. New Times, Inc.*, 976 F. Supp. 532 (N.D. Tex. 1997), the court concluded that the First Amendment bars prosecution under § 2510 for publication of a telephone conversation, which the paper obtained at a public school board meeting, but which had been illegally obtained by someone else. In contrast, one state court has taken the opposite view, that media organizations may be held civilly liable for disclosure of conversations that they obtained from sources who had engaged in illegal wiretapping and eavesdropping. *See Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. 1993), *aff'd* 616 N.Y.S.2d 318 (N.Y. App. Div. 1994). While neither of these cases is binding authority, the *Florida Star* line of cases obliges the Court to arrive at the same conclusion as *Peavy*.

C. Scrutiny of the Wiretapping Statutes

Given the facts of this case, the government may restrict defendant's exercise of speech only through a statute that furthers "a state interest of the highest order."[7] *Florida Star*, 491 U.S. at 541. Defendant argues both that the general government interest in regulating disclosure of wiretapped information is insufficient to leap this formidable hurdle, and that the particular facts of this case diminish the interests at stake, so that application of the statutes to this particular disclosure cannot meet constitutional standards.

The primary purpose of the federal wiretap statute is to "control the conditions under which interception will be permitted in order to safeguard the privacy of wire and oral communications." *Lam Lek Chong v. United States Drug Enforcement Agency*, 929 F.2d 729, 732 (D.C. Cir. 1991)(Citing S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)). *See also Gelbard v. United States*, 408 U.S. 41, 48 (1972). Congress has therefore placed substantial value on the privacy interests of users of telephones and other electronic, oral, and wire communication facilities, and has stated its intention to protect these interests from unscrupulous interlopers, such as the Martins.

Although protection of privacy is certainly a substantial government interest, it is not clear that it is an interest "of the highest order," such that it can trump defendant's First Amendment rights. The rape victims in *Florida Star* and *Cox Broadcasting* each had a substantial interest in privacy and anonymity, yet that interest was insufficient to overcome the First Amendment rights of the entities that printed or broadcast their names. Taking these cases as models for the present one, the Court cannot see how the government interest in protecting

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[7] The statute must also be "narrowly tailored" to further that interest. Florida Star, 491 U.S. at 541. Because the Court finds that there is not a sufficient interest to support this restriction on speech, it need not consider whether the statute is so tailored.

privacy of wire, electronic or oral communication is of any higher order than the protection of privacy for rape victims.

Furthermore, the circumstances of the present case suggest that the government interest in protecting the privacy of this particular plaintiff, in this particular situation, is diminished. Plaintiff does not claim to have suffered any direct injury—he makes no claim for compensatory damages, as the plaintiff in *Florida Star* did, but sues only for statutory and punitive damages, from which he cannot himself benefit.[8] Thus, plaintiff seeks less to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives. For this reason, the interest in protection of privacy is diminished in this case.

The *Florida Star* line of cases demonstrates that the privacy interests at stake in this case, while not insubstantial, are insufficient to overcome defendant's First Amendment rights. It is uncertain that the wiretap statutes could survive strict scrutiny in any case, since *Florida Star* demonstrates that not even a rape victim's interest in anonymity is sufficient to overcome that hurdle, but they certainly cannot survive scrutiny given the circumstances of the present case, which involves more partisan skirmishing than it does true vindication of privacy interests.

D. Conclusion

The First Amendment prevents the government from punishing the disclosure of truthful, lawfully obtained information of public significance. It is unfortunate that a United States Representative, who had chosen a position that supposedly illuminated him as a beacon of ethical behavior,[9] should so eagerly seek to capitalize on the skulduggery of

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[8] Plaintiff has financed this litigation with campaign funds, and the FEC ruling makes clear that plaintiff cannot personally share in any award.

[9] Rep. McDermott resigned his position on the House Ethics Committee when his disclosure of the illicitly taped conversation became public.

would-be party operatives to win petty, partisan victories in the press. The First Amendment is largely blind to motives, however, and it offers protection not only to the noble, but also to the ignoble. Thus, Rep. McDermott's actions are protected under the Amendment, and the Court must grant his motion to dismiss.

An order will accompany this opinion.

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-594 (TFH)
Filed July 28, 1998

ORDER

For the reasons stated in the Court's Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss [8] is **GRANTED**; it is further **ORDERED** that this case is **DISMISSED**.

July 27, 1998

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. BOEHNER,
7371 Charter Cup Lane
West Chester, OH 45069
Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-594 (TFH)

COMPLAINT

COMES NOW plaintiff John A. Boehner and hereby makes and files this Complaint against defendant Jim McDermott as follows:

PARTIES

1. Plaintiff John A. Boehner is a resident of the State of Ohio and a sitting member of the House of Representatives of the United States, representing the Eighth District of the State of Ohio. He is Chairman of the House Republican Conference.

2. Defendant Jim McDermott is a resident of the State of Washington and a sitting member of the House of Representatives of the United States, representing the Seventh District of the State of Washington. He is sued in his personal capacity. Defendant McDermott may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(e).

JURISDICTION AND VENUE

3. This civil action is a case of actual controversy between plaintiff and defendant which arises under federal statute and

may be finally adjudicated as between the parties. The rights here sought to be redressed are guaranteed by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-20.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 & 1367.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

STATEMENT OF FACTS

6. Plaintiff is a sitting member of the House of Representatives of the United States, representing the Eighth District of the State of Ohio. During late December 1996, he and his family were vacationing in Florida.

7. On December 21, 1996, plaintiff, in his capacity as Chairman of the House Republican Conference, participated in a conference call with the House Republican leadership. Plaintiff used his cellular telephone to participate in the call.

8. John and Alice Martin, both Florida residents, used a police scanner to intercept that cellular telephone call. They taped recorded a portion of the call.

9. On or about January 2, 1997, the Martins delivered that tape to the Gainesville, Florida, office of Rep. Karen Thurman, a Democratic member of the House of Representatives of the United States, representing the Fifth District of the State of Florida. Employees of Rep. Thurman's Florida office then shipped the tape to Thurman's Washington, DC, office via express mail.

10. On or about January 7 and 8, 1997, Rep. Thurman discussed the illegally intercepted cell-phone conversation with two aides to Rep. David E. Bonior, a Democratic member of the House of Representatives of the United States, representing the Tenth District of the State of Michigan, and the Minority Whip of the House. On information and belief, the Bonior aides advised Thurman about giving the tape to defendant

McDermott and about possible immunity for the Martins for their illegal interception of the cell-phone conversation.

11. On January 7, 1997, the Martins were in Washington, DC, for the swearing in of Rep. Allen Boyd, a Democratic member of the House of Representatives of the United States, representing the Second District of the State of Florida. On or about January 8, 1997, the Martins met with Rep. Thurman in her Washington, DC, office, where they prepared a cover letter addressing the tape to defendant McDermott.

12. Defendant McDermott is a Democratic member of the House of Representatives of the United States, representing the Seventh District of the State of Washington. He was the Ranking Minority Member on the House Committee on Standards of Official Conduct ("the Ethics Committee").

13. On or about January 8, 1997, the Martins delivered the tape to defendant McDermott, along with a cover letter to defendant McDermott stating that "[e]nclosed in the envelope you will find a tape of a conversation heard December 21, 1996 . . .. The call was a conference call heard over a scanner." The cover letter further explained that the Martins had tried to give the tape to Rep. Thurman and "were advised by her to turn the tape directly over to [defendant McDermott]. We understand that we will be granted immunity."

14. Defendant McDermott received the tape and told the Martins that he would listen to it.

15. Rep. Nancy L. Johnson, a Republican member of the House of Representatives of the United States representing the Sixth District of the State of Connecticut, and the Chair of the Ethics Committee, was not given and did not receive a copy of the tape at that time.

16. Robert Grisctl, attorney for the Martins, has publicly stated that "the couple gave a copy of the tape only to Mr. McDermott." *See* "Couple Who Taped Call Say Democrats Vowed Immunity," The Washington Times, Jan. 15, 1997, at A1.

17. On January 10, 1997, the New York Times ran an article disclosing the contents of the illegally-intercepted cell-phone conversation. *See* "Gingrich is Heard Urging Tactics in Ethics Case, "The New York Times, Jan. 10, 1997, at A1. That article described its source as follows:

> The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmissions of one of the participants. It was given to a Democratic Congressman, who made the tape available to The New York Times.
>
> . . .
>
> [A] transcript of the [cell-phone call] was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further. The Congressman said the tape had been given to him on Wednesday [Jan. 8] by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone.

Similar stories were also run in the Atlanta Journal/Constitution and in Roll Call (a newspaper published in Washington, DC).

18. On January 13, 1997, the Martins held a public news conference in which they asserted that they had given a copy of the illegally-intercepted tape to defendant McDermott.

19. That same day, after the Martins' news conference, defendant McDermott delivered a copy of the tape to the House Ethics Committee. Rep. Johnson, Chair of that Committee, immediately sent the tape to the United States Department of Justice. Defendant McDermott resigned from the Ethics Committee that same day.

20. On information and belief, on or about January 9, 1997, defendant McDermott caused a copy of the tape of that illegally-intercepted conversation to be given to the New York

Times, the Atlanta Journal/Constitution, and Roll Call. Defendant did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted (as the cover letter on its face disclosed).

21. Defendant McDermott's intentional disclosure of the contents of a cell-phone conversation which he knew or had reason to know had been illegally intercepted violated 18 U.S.C. § 2511(c). That disclosure to outside, third-party newspapers was for private, partisan purposes, and was not essential to, or even related to, the legislative process. The disclosure was also made in wanton, reckless, and malicious disregard o[f] plaintiff's rights.

22. On March 26, 1997, the Department of Justice asked the New York Times, the Atlanta Journal/Constitution, and Roll Call to turn over their copies of the tape and "any accompanying letter" from their source. Each of the newspaper refused to produce the tapes or any letters.

23. On April 23, 1997, John and Alice Martin pleaded guilty to intentionally intercepting a wire communication in violation of 18 U.S.C. §§ 2511(1)(a) and 2511(4)(b)(ii).

COUNT 1

24. Plaintiff repeats and realleges each allegation contained in paragraphs 1 through 23 and incorporates them herein by reference.

25. Defendant violated 18 U.S.C. § 2511(c), which makes punishable by law any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."

26. Defendant is liable for civil remedies to plaintiff under 18 U.S.C. § 2520 for defendant's violation of 18 U.S.C. § 2511 (c).

COUNT 2

27. Plaintiff repeats and realleges each allegation contained in paragraphs 1 through 23 and incorporates them herein by reference.

28. Defendant violated Fla. St. § 934.03(1)(c), which makes punishable by law any person who "[i]ntentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception, of a wire, oral, or electronic communication in violation of this subsection."

29. Defendant is liable for civil remedies to plaintiff under Fla. St. § 934.10 for defendant's violation of Fla. St. § 934.03(1)(c).

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

(a) Award to plaintiff statutory damages under 18 U.S.C. § 2520(c)(2)(B) for each of the violations;

(b) Award to plaintiff statutory damages under Fla. St. § 934.10(1)(b) for each of the violations;

(c) Award to plaintiff punitive damages under 18 U.S.C. §2520(b)(2) and Fla. St. § 934.10(1)(c);

(d) Award to plaintiff reasonable attorney's fees and other litigation costs reasonably incurred, as provided under 18 U.S.C. § 2520(b)(3) and Fla. St.§ 934.10(1)(d); and

(e) Award to plaintiff such additional and further relief as the Court deems just and proper.

March 9, 1998

Respectfully submitted,

/s/ Michael A. Carvin
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JOHN A. BOEHNER

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GLORIA BARTNICKI and ANTHONY F. KANE, Jr.,

Plaintiffs-Appellees,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JANE DOE; JOHN DOE; and JACK YOCUM,

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; and JACK YOCUM,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 98-7156

PETITION OF THE UNITED STATES FOR PANEL REHEARING AND REHEARING EN BANC

DAVID W. OGDEN
Acting Assistant
Attorney General

DAVID M. BARASCH
United States Attorney

DOUGLAS N. LETTER
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* * *

STATEMENT OF COUNSEL REGARDING REHEARING *EN BANC*

Pursuant to LAR 35.1, I express a belief, based on a reasoned and studied professional judgment, that this appeal presents the following question of exceptional importance:

> Whether 18 U.S.C. §§ 2511(1)(c) and 2511(1)(d), which prohibit the disclosure and other uses of information obtained through illegal electronic surveillance, violate the First Amendment when applied to disclosure of illegally intercepted information about matters of "public significance" by persons who know or have reason to know that the information was intercepted unlawfully but who were not involved in the surveillance.

/s/ Scott R. McIntosh
Scott R. McIntosh
Counsel for the United States

INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the federal wiretapping statute, represents a comprehensive effort by Congress to protect private channels of communication from unauthorized electronic surveillance. In enacting Title III, Congress recognized that "[o]nly by striking at all aspects of the problem [of electronic surveillance] can privacy be adequately protected." 1968 U.S. Code Cong. & Admin. News. 2156. Therefore, in addition to prohibiting the *interception* of private communications, Congress also prohibited the *use* of illegally intercepted communications, including but not limited to disclosure of such communications, by anyone who knows or has reason to know that the information was obtained in violation of Title III. By prohibiting the use of illegally intercepted communications, Congress sought to protect against the additional injury to personal privacy that occurs when private communications are disclosed or otherwise used without the speakers' consent. At the same time, prohibiting the use of illegally intercepted communications reinforces the underlying ban on interception, by curtailing demand for the fruits of electronic surveillance and preventing the wiretapper from benefitting from his illegal acts.

In this case, a divided panel of this Court has now held that Title III's prohibitions on the use of illegally intercepted communications violate the First Amendment when applied to the disclosure of intercepted information about matters of "public significance" by persons who did not participate in the illegal interception, even if those persons know that the information was obtained illegally. The D.C. Circuit recently has rejected a similar First Amendment challenge to Title III in *Boehner v. McDermott*, 191 F.3d 463 (1999). The panel decision creates a serious gap in the comprehensive scheme created by Congress to protect private communications. At the same time, the decision also casts doubt on the constitutionality of similar provisions in a host of state wiretapping laws. In the words of the dissent by District Judge Pollak, "in the two

centuries of our constitutional history there cannot have been more than a handful of prior decisions . . . which, in the exercise of the awesome power of judicial review, have cut so wide a swath." Before the considered efforts of Congress and the states to protect individual privacy are jeopardized in this fashion, further review by this Court is called for.

STATEMENT OF THE CASE

1. This case involves the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the federal wiretapping statute. Title III is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). Title III's fundamental purpose is to "protect[] the privacy of wire[, electronic,] and oral communications . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code & Cong. Admin. News 2153.

At the heart of Title III is a general prohibition on the intentional interception of wire, electronic, and oral communications. 18 U.S.C. § 2511(1)(a). In addition to prohibiting the interception of private communications, Title III also broadly prohibits the intentional *use* of illegally intercepted communications by anyone who knows or has reason to know that the communications were intercepted in violation of Title III. *Id.* §§ 2511(1)(c)-(d); *see also id.* § 2515. This prohibition applies both to the disclosure of illegally intercepted information (*id.* § 2511(1)(c)) and to uses of the information that do not involve disclosure (*id.* § 2511(1)(d)).

As this Court has explained, the provisions of Title III reflect Congress's considered judgment that protecting the privacy of communications demands a comprehensive approach:

> [P]rotection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these

> interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization [of interception] and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

United States v. Cianfrani, 573 F.2d 835, 856 (3d Cir. 1978). The object of Title III is "to give maximum protection to these privacy interests." *In re Grand Jury*, 111 F.3d 1066, 1074 (3d Cir. 1997) (internal quotation marks omitted).

2. In 1993, two representatives of a Pennsylvania teachers union, Gloria Bartnicki and Anthony Kane, conducted a private telephone conversation concerning contract negotiations between the union and a local school board. An unknown person illegally intercepted the conversation, then anonymously placed a recording of the conversation in the mailbox of Jack Yocum, the president of a local taxpayers association that opposed the union. Yocum listened to the recording and gave a copy to Frederick Vopper, the host of a local radio talk show. Vopper broadcast the tape recording in its entirety on two local radio stations, WILK and WGBI-AM.

Bartnicki and Kane brought suit against Yocum, Vopper, and the radio stations under Title III and Pennsylvania's electronic surveillance statute. The plaintiffs claimed that the defendants had violated 18 U.S.C. §§ 2511(1)(c) and 2511(1)(d) by disclosing and using the contents of the taped conversation with knowledge or reason to know that the conversation was intercepted illegally. The defendants moved for summary judgment on the ground, *inter alia*, that the First Amendment protects the disclosure of private communications obtained through illegal electronic surveillance as long as the persons who disclose the information did not themselves participate in the interception and the information concerns matters of "public significance."

The district court rejected the defendants' First Amendment claim, but certified the constitutional question for interlocutory appeal under 28 U.S.C. § 1292(b). This Court accepted the interlocutory appeal and heard oral argument in October 1998. Immediately thereafter, the Court notified the Attorney General that the constitutionality of Title III was at issue and invited the United States to express its views. Acting pursuant to 28 U.S.C. § 2403, which authorizes the United States to intervene as of right when the constitutionality of an Act of Congress is called into question in private litigation, the United States intervened in the appeal and filed a brief defending the constitutionality of Title III.

3. On December 27, 1999, a divided panel of this Court reversed the district court, holding that Title III violates the First Amendment insofar as it prohibits "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." [200 F.3d 109, 129] (Sloviter & Cowen, JJ.). The panel majority agreed with the United States that the provisions of Title III at issue in this case are subject to intermediate First Amendment scrutiny, not (as the defendants argued) strict scrutiny. *Id.* at [119-23]. However, the majority held that the provisions do not satisfy the requirements of intermediate scrutiny. *Id.* at [123-29]. District Judge Pollak dissented, concluding that the challenged provisions survive intermediate scrutiny and that "the First Amendment values on which defendants take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension." *Id.* at [136].

4. While this appeal was pending, the D.C. Circuit was presented with a similar First Amendment challenge to the constitutionality of Title III in *Boehner v. McDermott*, 191 F.3d 463 (1999). In *Boehner*, a member of the House of Representatives, Jim McDermott, was given a recording of an illegally intercepted telephone conversation between Representative John Boehner and other members of the House,

including then-Speaker Newt Gingrich. McDermott gave the recording to the New York Times and other newspapers, which published the contents of the recording. Boehner sued McDermott under Title III for disclosing the conversation.

The district court dismissed Boehner's suit on First Amendment grounds. On appeal, the D.C. Circuit reversed, holding that the application of Title III to Representative McDermott did not violate the First Amendment. Like the panel in this case, the panel majority in *Boehner* used intermediate scrutiny, rather than strict scrutiny, in reviewing the First Amendment claim. 191 F.3d at 467-470, 480. However, the panel majority in *Boehner* held that the application of Title III to Representative McDermott satisfied the requirements of intermediate scrutiny. *Ibid.* The D.C. Circuit denied rehearing *en banc* in *Boehner* on December 28, 1999.

ARGUMENT

The Divided Panel Holding That Federal Prohibitions on Disclosure of Illegally Intercepted Communications Violate the First Amendment Should Be Reheard

Declaring an Act of Congress unconstitutional is "the gravest and most delicate duty that [a court] is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In this case, a panel of this Court has held that Congress exceeded the limits of its power under the First Amendment when it prohibited the disclosure of illegally intercepted communications by persons who know or have reason to know that the communications were intercepted in violation of federal law. As a legal matter, the panel decision is open to serious question: as demonstrated by Judge Pollak's dissent and by the D.C. Circuit's decision in *Boehner*, there are substantial grounds for concluding, contrary to the panel majority, that Title III's use restrictions are an entirely permissible exercise of Congressional authority. And as a practical matter, the panel decision threatens to do serious damage to legislative efforts to protect the security of private

channels of communications—damage that is not confined to Title III, but rather extends to the law of every State in this Circuit and numerous other States as well. Given the legal and practical significance of the panel decision, and the questionable nature of its constitutional reasoning, further review is warranted.

1. As the panel majority itself recognized, Title III's restrictions on the use of illegally intercepted communications are "content-neutral": they impose liability based not on the content of the information, but rather on the means by which the information was acquired. [200 F.3d at 121-23]; *Boehner*, 191 F.3d at 467-468. Accordingly, the panel subjected the challenged provisions to intermediate scrutiny, rather than strict scrutiny, under the First Amendment. *Ibid.* A content-neutral statute satisfies intermediate scrutiny "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994). For reasons suggested by Judge Pollak's dissent and by the D.C. Circuit in *Boehner*, Title III's use restrictions readily satisfy this test.

Title III's overarching purpose is to protect and maintain the confidentiality of wire, electronic, and oral communications. That interest is manifestly a substantial one, as this Court itself has repeatedly recognized. *See Cianfrani*, 573 F.2d at 856 ("protection of the privacy of communications is vital to our society"); *In re Grand Jury*, 111 F.3d at 1074 (privacy interests underlying Title III are "'sufficiently weighty' to justify even limitations on the Sixth Amendment right of public access to court proceedings"). Not only are Title III's privacy interests substantial ones, but they are entirely unrelated to "the suppression of free expression." *See Boehner*, 191 F.3d at 468. Indeed, Title III actually *furthers* the cause of free expression: by enhancing the security of private channels of communication, it encourages exchanges of information and

ideas that might not otherwise take place at all. *Ibid.* "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663.

The statutory provisions at issue in this case, 18 U.S.C. §§ 2511(1)(c) and 2511(1)(d), are integral to the protection of the privacy interests underlying Title III. Disclosure and other uses of illegally intercepted communications cause additional, and potentially far greater, harm to privacy interests than does interception itself. *See Gelbard*, 408 U.S. at 52 (disclosure "compound[s] the statutorily prescribed invasion of . . . privacy"); *Boehner*, 191 F.3d at 468. By making the use of illegally intercepted communications unlawful, Title III directly protects against this additional injury to personal privacy. At the same time, prohibiting the use of illegally intercepted communications reinforces the underlying prohibition on illegal surveillance itself, by reducing demand for intercepted information and depriving potential wiretappers of the fruits of their labors. *Boehner*, 191 F.3d at 469-470; *see Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991). By protecting private channels of communication in these two different but related ways, Title III's use prohibitions further encourage the free exchange of information and ideas.

Only by comprehensively restricting the use of illegally intercepted communications can the privacy interests served by Title III be fully vindicated. As the D.C. Circuit explained in *Boehner*, 191 F.3d at 470:

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping[,] [because] [o]ne would not expect them to reveal publicly the contents of the communication . . .. It was therefore 'essential' for Congress to impose upon

third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

2. Despite these considerations, the panel majority concluded that the application of Title III to the disclosure of intercepted information by persons who were not involved in the illegal interception does not satisfy intermediate scrutiny. Judge Pollak's dissent identifies basic shortcomings in the panel majority's reasoning. *See* [200 F.3d at 131-36]. Several aspects of the majority opinion call for particular comment.

A. As explained above, by prohibiting the disclosure and other uses of intercepted communications, Title III directly protects the interest of private parties in the confidentiality of their communications. The panel majority misunderstood the nature of this privacy interest, and largely because of that misunderstanding, wrongly declined to give it any weight in the constitutional balance. *See* [200 F.3d at 122-23].

The panel assumed that Title III's use restrictions are designed to protect "intimate facts," and suggested that maintaining the privacy of "intimate facts" is not a content-neutral (and hence cognizable) interest because it turns on the communicative impact of the particular information being disclosed. [200 F.3d at 122]. But Title III is *not* designed to maintain the privacy of "intimate facts." Title III's use restrictions look not to the subject matter or "intimate" character of the information at issue, but instead to the invasive means by which the information was acquired. Like Title III's underlying prohibition on electronic surveillance, the use prohibitions are designed to maintain the privacy of a "place" (the Nation's communications networks), not to prevent the disclosure of intimate or otherwise sensitive information. The governmental interest in protecting private channels of communication is both substantial and entirely legitimate for purposes of intermediate First Amendment scrutiny. And it can hardly be gainsaid that that interest is directly advanced by

prohibiting disclosure and other uses of intercepted information.[10]

B. The panel majority also erred in its evaluation of Title III's use restrictions as a means of deterring electronic surveillance in the first instance. *See* [200 F.3d at 125-26]. The deterrent value of the challenged provisions is straightforward: if no one can lawfully disclose or otherwise use information that they know to be the product of illegal electronic surveillance, then there can be no "market" for illegally intercepted communication. By curtailing demand for intercepted information, Title III reduces the incentive for wiretapping, and thereby reinforces the deterrent effect of the underlying prohibition on electronic surveillance. *See Boehner*, 191 F.3d at 469-470.

The panel dismissed this deterrent rationale as "ipse dixit" that rests on "nothing more than assertion and conjecture." [200 F.3d at 126]. But supply and demand are two sides of the same coin; it is hardly "ipse dixit" or "conjecture" to say that reducing one will reduce the other. In *Boehner*, the D.C. Circuit regarded this connection as axiomatic. *See* 191 F.3d at 469-470. And the Supreme Court relied on the same rationale in *New York v. Ferber*, 458 U.S. 747, 759-60 (1982), where it held that "[t]he most expeditious if not the only practical method" of effectuating a ban on the production of child pornography "may be to dry up the market for this material" by imposing sanctions on advertising and distribution. Given the immediate connection between supply and demand for illegally intercepted information, the government hardly needs to provide evidentiary "proof" for the obvious proposition that more surveillance will take place if eavesdroppers enjoy an

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[10] The United States addressed this interest in detail in its intervenor brief. *See, e.g.*, U.S. Brief 24-25, 34, 36-37. Perhaps because the panel majority did misperceived [*sic*] the nature of the proffered interest, the panel mistakenly thought that the United States "for the most part eschews reliance on that justification." [200 F.3d at 123].

unrestricted market for the fruits of their illegal labors.[11] *Cf. Nixon v. Shrink Missouri Government PAC*, 2000 WL 48424, at *9 (U.S. Jan. 24, 2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").[12]

The panel majority also reasoned that "the government's desired [deterrent] effect can be reached by enforcement of existing provisions against the responsible parties"—that is, by punishing the persons who carry out illegal electronic surveillance. [200 F.3d at 126]. But the facts of this case graphically demonstrate the flaws in that reasoning. Neither the plaintiffs nor the government can enforce Title III against "the responsible parties" in this case, for the simple reason that the person who carried out the electronic surveillance is unknown. By its very nature, electronic surveillance is a surreptitious enterprise, and an eavesdropper can effectively insulate himself from liability, as here, simply by conveying the intercepted information anonymously to other persons. *See Boehner*, 191 F.3d at 470. As a result, "enforcement of existing provisions against the responsible parties" is not enough to deter illegal surveillance. As Congress recognized, "[o]nly by striking at all aspects of the problem can privacy be adequately protected." 1968 USCCAN at 2156.

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[11] The panel misunderstood the government to be characterizing the person who uses the information, rather than the eavesdropper, as the "wrongdoer," *see* [200 F.3d at 125].

[12] When the constitutionality of an Act of Congress is called into question in private litigation, federal courts are supposed to give the United States an opportunity for "presentation of evidence" on the constitutional issue. 28 U.S.C. § 2403(a). In this case, however, the Attorney General did not receive notice of the constitutional challenge to Title III until after the oral argument in this Court. Assuming *arguendo* that a particular evidentiary showing is required to vindicate the challenged provisions of Title III, the Court should not invalidate those provisions without first giving the United States the opportunity to provide such support.

C. On the other side of the constitutional scale, the panel majority expressed concern that the threat of liability under Title III for the use of illegally intercepted communications would deter the news media from disseminating information that is *not* the product of an illegal interception. [200 F.3d at 126-27]. In light of Title III's *scienter* requirements, however, this "chilling" concern appears to be overstated. Liability attaches under 28 U.S.C. §§ 2511(1)(c) and 2511(1)(d) only when a defendant "know[s] or ha[s] reason to know" that information was intercepted in violation of Title III. As long as the press has a reasonable belief that proffered information was not obtained unlawfully, it does not face liability, even if the information *was* the product of illegal electronic surveillance. Thus, in cases where reporters lack the means to determine "the precise origins of information they receive from witnesses and other sources, []or whether the information stems from a lawful source" [200 F.3d at 127], the *scienter* requirement shields them from liability.[13] To the extent that there are may be remaining concerns about the potential chilling effect of the statute, those concerns can be dealt with adequately through the burden of proof and other procedural mechanisms discussed by Judge Pollak. *See* [200 F.3d at 135-36].

Ironically, the panel's decision itself creates the prospect of chilling private speech. Under the panel decision, whenever individuals wish to engage in a private telephone conversation about subjects that might be thought to have "public significance," they must do so at their own risk, for if their conversation is intercepted, anyone other than the wiretapper himself is free to disclose the contents of the conversation to

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[13] In many cases, of course, it will be clear from the information itself and other circumstances that the information was obtained through illegal surveillance. Here, for example, the surreptitious delivery of a recording of a private conversation whose contents reflect adversely on the speakers strongly indicates that the information was gained by unauthorized surveillance. *See also* [200 F.3d at 135] (Pollak, D.J., dissenting).

the world at large. If individuals lack the assurance that the law will effectively protect the confidentiality of their conversations, their willingness to speak candidly (or at all) will necessarily suffer. In the words of the Supreme Court, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests . . . ." *United States v. Nixon*, 418 U.S. 683, 705 (1974). Thus, while acting in the name of the First Amendment, the panel has inadvertently jeopardized the very exchange of ideas that the First Amendment is intended to encourage.

3. For the foregoing reasons, the panel decision does potentially serious damage to Congress's "comprehensive scheme" (*Gelbard*, 408 U.S. at 46) for protecting the confidentiality of private channels of communication. But the impact of the panel opinion is not confined to Title III. By its own terms, the panel decision also invalidates the corresponding provisions of the Pennsylvania electronic surveillance statute. And as explained by Judge Pollak, many other States, including the other States in this Circuit, have comparable restrictions on the use of illegally intercepted communications in their own wiretapping statutes. *See* [200 F.3d at 134] & n.5 (Pollak, D.J., dissenting); *see also Boehner*, 191 F.3d at 468 n.6 (Randolph, J.) (45 states "prohibit not only the interception of electronic communications, but also the disclosure of those communications by persons not acting under color of law"). Thus, the decision has ramifications that reach far beyond Title III itself. Before this Court "cut[s] so wide a swath" through state and federal laws designed to protect private communications ([200 F.3d at 134] (Pollak, D.J., dissenting)), further review is called for.

CONCLUSION

For the foregoing reasons, this appeal should be reheard.

Respectfully submitted,

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* * *

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GLORIA BARTNICKI and ANTHONY F. KANE, Jr.,

Plaintiffs-Appellees,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JANE DOE; JOHN DOE; and JACK YOCUM,

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEYMARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; and JACK YOCUM,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Intervenor.

NO. 98-7156

AMENDED SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, and COWEN*, *Circuit Judges* and POLLAK, *District Judge***

The petition for rehearing filed by the Appellees and Amicus Pennsylvania State Education Association and the petition for rehearing filed by Intervenor United States in the above-entitled case having been submitted to the judges who

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* Hon. Robert E. Cowen, Senior Circuit Judge, as to panel rehearing only.

** Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.

participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing.

By the Court

/s/ Delores K. Sloviter
Circuit Judge

Dated: Feb. 28, 2000
lmc\cc: DHB
JAC
FJA
SCG
RPW
DNL
SRM

Supreme Court, U.S.
FILED
MAY 23 2000
CLERK

No. 99-1709

In The

Supreme Court of the United States

JAMES A. McDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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COUNTERSTATEMENT OF THE CASE

Petitioner elides the facts that implicate him in criminal wrongdoing and that are central to this case, *see* Petition for a Writ of Certiorari ("Pet.") at 5 (omitting any discussion of McDermott's dissemination of the tape on January 9, 1997), and distorts the court of appeals' decision. Thus, a brief counterstatement of the case is necessary.

1. After illegally intercepting Representative Boehner's telephone conversation, John and Alice Martin met with Democratic Representative Karen Thurman of Florida to discuss the tape and the possibility of receiving immunity for their illegal conduct. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 3a. At Representative Thurman's suggestion, the Martins personally delivered the tape on January 8, 1997 to Representative McDermott in his capacity as the ranking member of the House Ethics Committee. Pet. App. 3a. The Martins' cover letter that accompanied the tape put Representative McDermott on notice of its illegal provenance by stating that the tape contained "a conference call heard over a scanner." Pet. App. 3a. The letter also indicated that the Martins were under the impression that they would "be granted immunity." Pet. App. 3a. As Judge Randolph noted, this reference to a promise of immunity gives rise to an inference that the "transaction may have involved a *quid pro quo*" and that McDermott is the "obvious candidate" to have brokered this "illegal transaction." Pet. App. 23a.

The next day, Representative McDermott gave copies of the tape to the *New York Times*, the *Atlanta Journal-*

Constitution, and *Roll Call*. Pet. App. 3a. The following day, January 10, 1997, the *New York Times* ran a front-page story that included a verbatim transcript of a portion of the illegally intercepted conversation. The *Times* reported that it had received the tape from a "Democratic Congressman hostile to Mr. Gingrich [and who] insisted that he not be identified further." Pet. App. 6a. Thus, there can be little doubt that Representative McDermott himself distributed copies of the tape to the media.

Representative McDermott's distribution of the tape constituted a violation of the Rules of the House Committee on Standards of Official Conduct pursuant to which representative McDermott swore:

> I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the Committee, except as authorized by the Committee or in accordance with its rules.

Rules of the House Committee on Standards of Official Conduct 7, at 197; *see also* Rules of the House of Representatives X, cl. 4, § 698(E)(4) (same). In light of this violation, Representative McDermott resigned from the House Ethics Committee on January 13, 1997. *See* Pet. App. 3a.

Notwithstanding petitioner's unfounded suggestions to the contrary, the contents of the tape did not suggest apparent "official misconduct." Rather, as the court of appeals recited, "[t]he participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and

to pay a fine in exchange for the committee's promise not to hold a hearing." Pet. App. 3a. Plainly, there is nothing improper about such a conversation.

2.a. The majority of the court of appeals squarely held that 18 U.S.C. § 2511(1)(c) (the "Act") is constitutional under the intermediate scrutiny standard.[1] Applying this Court's familiar test from *United States v. O'Brien*, 391 U.S. 367 (1968), the court of appeals held that the Act promotes "substantial governmental interest[s]" "unrelated to the suppression of free expression." Pet. App. 9a. The court reasoned that the Act promotes freedom of speech because disclosure of illegally intercepted conversations destroys the privacy of those conversations and inhibits candid exchanges. Pet. App. 9a. Moreover, the court observed that the government has a substantial interest in prohibiting both the interception and distribution of illegally intercepted communications, each of which has a distinct chilling effect on freedom of speech. Pet. App. 9a (citing *Gelbard v. United States*, 408 U.S. 41, 52 (1972)). The court noted that public dissemination of a private conversation compounds the initial harm of interception and directly infringes on the " 'freedom not to speak publicly.' " Pet. App. 10a (quoting *Harper & Row*,

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[1] Petitioner somewhat cryptically states that Judge Ginsburg "did not join Judge Randolph's reasoning" while acknowledging that Judge Ginsburg joined Judge Randolph's opinion as it applied intermediate scrutiny. *See* Pet. 9. Judge Ginsburg clearly stated, however, that he concluded that the Act survives intermediate scrutiny "for the reasons stated in the opinion for the Court." Pet. App. 29a. *See also* Pet. App. 32a ("I agree the statute passes [intermediate scrutiny] for the reasons given in the opinion for the Court at [8a-13a].").

Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (internal citations omitted).

Thus, the majority found that the Act's prohibition on distribution of illegally intercepted conversations served an important governmental interest in limiting the harm and chilling effect caused by involuntary disclosure of private speech. In addition, likening the Act's prohibition on dissemination to similar restrictions in dealing in stolen property or child pornography, the court stated that such restrictions play an important role in drying up the market for the illicit item. Pet. App. 12a (citing *Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 760 (1982)).

In light of these considerations, the majority concluded that the Act's incidental restriction on speech is "no greater than is essential to the furtherance of [the] interest" it seeks to advance. Pet. App. 12a. The court reasoned: "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded." Pet. App. 12a. In short, the court found that both the prohibitions on interception and distribution of private conversations were necessary to achieve the government's substantial interest in promoting candid and open private conversations. Neither petitioner nor the dissenting judge challenged the finding that the Act satisfies intermediate scrutiny.

b. It is also common ground among all the members of the court below that this Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), does not authorize strict scrutiny of the Act.

Judge Randolph set forth several reasons for rejecting petitioner's contention that the Act should be subject to strict scrutiny under *Florida Star*. As a threshold matter, the *Florida Star* opinion itself expressly stated that it was not extending its strict scrutiny principle to situations where, as here, " 'information has been acquired unlawfully . . . by a *source*.' " Pet. App. 16a (quoting *Florida Star*, 491 U.S. at 535 n.8 (emphasis added)). The court explained at length that petitioner's effort to avoid the plain language of the footnote was "thoroughly unconvincing." Pet. App. 17a; *see* Pet. App. 16a-22a. More generally, Judge Randolph noted several important differences between the Act and the statute at issue in *Florida Star*. First, the laws have different objectives. "The Florida statute sought to protect the privacy of rape victims" whereas the Act "seeks to protect the privacy of communications" and thereby promotes the right not to speak publicly. Pet. App. 15a-16a. Second, the information that the Florida statute shielded was already in the government's possession and thus release of the information was in the government's control. Pet. App. 16a. Third, the Florida statute was content-based as it was triggered only by the release of information relating to the identity of rape victims. Pet. App. 16a. Title III's restrictions apply regardless of the speaker or content of the speech. Fourth, there was no scienter requirement under the Florida statute, which imposed liability even when the newspaper had no inkling that the information it was disclosing was confidential. By contrast, the Act is triggered only where the original interception is illegal and the person charged with disclosing its contents knew, or should have known, of the illegality. Pet. App. 16a.

Judge Randolph also concluded that application of strict scrutiny to the Act was inappropriate because none of the considerations identified by the Supreme Court in *Florida Star* are present here. First, the information in *Florida Star* was " 'entrusted to the government,' " and thus there was a less drastic means than punishing truthful publication to guard against the dissemination of the relevant information. Pet. App. 22a (quoting 491 U.S. at 534). By contrast, the contents of Representative Boehner's private conversation were not "entrusted to the government." Pet. App. 22a. Second, unlike the newspaper in *Florida Star,* Representative McDermott did not lawfully obtain the information because "the Martins *and* McDermott gained their knowledge of the call only through illegal transactions." Pet. App. 23a (emphasis in original). Third, the Court in *Florida Star* had stated that " 'punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act.' " Pet. App. 22a (quoting 491 U.S. at 535). By way of contrast, the information that the Act protects is not "already publicly available." Moreover, the government's prohibition on dissemination of this confidential information is the least intrusive means of advancing the government's interest in confidentiality. Fourth, the Court in *Florida Star* was concerned that the Florida statute at issue would foster self-censorship among the media if they could be punished for publishing "information released, without qualification, by the government." 491 U.S. at 536. That concern is not implicated by the Act which limits liability to those, like Representative McDermott, who distribute communications

which they know to have been illegally intercepted. Given that none of the considerations that led the Court in *Florida Star* to apply strict scrutiny are present here, Judge Randolph concluded that the rule of *Florida Star* had no application to the Act.[2]

Judge Randolph also concluded that an extension of *Florida Star* was particularly unwarranted as it would contravene the *Florida Star* Court's repeated admonition that "our holding today is limited." *Florida Star*, 491 U.S. at 541. *See* Pet. App. 15a (citing 491 U.S. at 531 n.5, 532, 531). Moreover, petitioner's proposed reading of *Florida Star* would render that decision fundamentally inconsistent with several of this Court's precedents which have established the principle that statutes which prohibit the

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[2] Petitioner's suggestion that Judge Randolph "refused to apply strict scrutiny on the theory that this case is not about speech at all" is thus incorrect. *See* Pet. 8. Judge Randolph rejected application of *Florida Star* for the reasons cited above. As for Judge Randolph's discussion suggesting that Representative McDermott did not engage in "speech" by distributing copies of the tape, this portion of his opinion was not joined by Judge Ginsburg and thus does not reflect the views of the majority of the panel. Moreover, Judge Randolph himself proceeded " 'on the assumption that there was [some] communicative element' " in Representative McDermott's release of the tape. Pet. App. 7a (quoting *O'Brien*, 391 U.S. at 376). By applying *O'Brien*'s intermediate standard of scrutiny, Judge Randolph, joined by Judge Ginsburg, applied precisely the same level of scrutiny that would govern a content-neutral regulation of expression protected by the First Amendment. Thus Judge Randolph's suggestion that Representative McDermott's conduct might not be protected by the First Amendment at all did not influence the court below's disposition of this case.

disclosure of private or confidential information do not offend the First Amendment. *See* Pet. App. 24a-26a (citing, *e.g.*, *Harper & Row*, 471 U.S. at 555-60 (upholding prohibition on unauthorized publication of copyrighted material); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 36-37 (1984) (upholding protective order pertaining to disclosure of private information lawfully acquired by litigants)). Such prohibitions serve as an " 'engine of free expression' " by promoting exchanges of confidential information. Pet. App. 26a (quoting *Harper & Row*, 471 U.S. at 558).

Judge Ginsburg also rejected application of the rule of *Florida Star* in the instant case on the ground that Representative McDermott had not "lawfully obtained" the information he disclosed. He reasoned, "[o]ne who obtains information in an illegal transaction, with full knowledge that the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense." Pet. App. 30a. For this reason, Judge Ginsburg concluded *Florida Star* was inapposite.

Even Judge Sentelle in his dissent acknowledged that *Florida Star* reserved the issue presented by this case without deciding it. Pet. App. 40a. Judge Sentelle concluded that strict scrutiny should apply because "the statutes before us burden speech based on its content – that is they forbid its publication because it contains information obtained at an earlier time in an illicit fashion." Pet. App. 40a. As Judge Randolph explained, this is facially erroneous because the Act's protection is triggered irrespective of the content of the intercepted communication and would have applied equally to, for

example, a conversation by Mr. Boehner regarding mundane domestic matters. Pet. App. 27a. Presumably for this reason, petitioner has never disputed that the Act is strictly content-neutral.

c. On December 27, 1999, the Court of Appeals for the Third Circuit opined on the Act's constitutionality in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), *petition for cert. filed* (U.S. Apr. 19, 2000) (99-1687), and *petition for cert. filed* (U.S. Apr. 27, 2000) (99-1728). That court also rejected the contention that strict scrutiny ought to be applied to the Act under *Florida Star*, for many of the same reasons outlined by Judge Randolph. *See* Appendix to the Petition for a Writ of Certiorari in *United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728) ("*Vopper* Pet. App.") 13a-14a.

The Third Circuit found that the Act was content-neutral, and thus applied intermediate scrutiny. *Vopper* Pet. App. 27a-28a. The majority concluded that the Act did not satisfy intermediate scrutiny because the United States had not "offered" sufficient evidence to establish that the Act "promote[d] privacy by eliminating the demand for intercepted materials on the part of third parties." *Vopper* Pet. App. 33a. The majority reached its conclusions without any reference to this Court's decision in *New York v. Ferber*, 458 U.S. 747, 760 (1982) (upholding a prohibition on the distribution of child pornography on the ground that it would "dry up the market" for such products) and without acknowledging the host of other laws that are premised on a similar rationale. Likewise, the *Bartnicki* majority did not address Judge Randolph's

separate basis for upholding the Act; namely, that disclosure of an illegally intercepted conversation compounds and exacerbates the invasion of privacy caused by interception. Instead, the majority distinguished the result in *Boehner* on the grounds that Representative McDermott "was more than merely an innocent conduit" of the intercepted conversation because, unlike the private defendant in *Bartnicki*, he knew and worked with those who intercepted the conversation to disclose it. *Vopper* Pet. App. 40a.

DISCUSSION

Applying intermediate scrutiny under the First Amendment, the court of appeals upheld an act of Congress which rendered petitioner civilly liable for transmitting a tape of a private phone call which he knew was stolen and that he had directly received from those who had illegally taped it. Petitioner maintains that this Court's precedents, and fundamental First Amendment principles, require that the Act's content-neutral prohibition against disclosing someone else's illegally-obtained speech must be subjected to the same level of strict First Amendment scrutiny that would be applied to a content-based restriction prohibiting petitioner from engaging in his own speech. This is patently erroneous for a number of reasons, as the opinions below fully explained.[3]

[3] Content-neutral restrictions, such as the Act, are subject to the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), not the strict scrutiny applied to content-based prohibitions. *See City of Erie v. Pap's A.M.*, 120

Nevertheless, a recent decision by the Third Circuit held that the Act fails intermediate scrutiny and *certiorari* petitions in that case have been filed by both the United States and the private petitioner. *Bartnicki v. Vopper*, 200

S. Ct. 1382, 1391 (2000); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994); Petition for a Writ of Certiorari in *United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728) 11-13; Pet. App. 7a. Moreover, pursuant to at most intermediate scrutiny, this Court has repeatedly upheld the imposition of civil sanctions on those who disclose the speech of others when they have acquired that speech either unlawfully or pursuant to a duty of nondisclosure. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (upholding civil damages award for the unauthorized disclosure of truthful copyrighted materials by a former President without any heightened First Amendment scrutiny); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (upholding, under intermediate scrutiny, prior restraint prohibiting a newspaper from disclosing truthful, publicly-important information it lawfully obtained through civil discovery); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (upholding civil damages award for news broadcast of publicly performed act without heightened First Amendment scrutiny); *United States v. Aguilar*, 515 U.S. 593 (1995) (upholding criminal penalty for disclosing truthful information about a legal wiretap). Pet. App. 24a, 26a. Here, the tape of respondent Boehner's private conversation did not "lawfully come into [petitioner's] hands" because it was unlawful for his sources to both acquire it and transmit it to petitioner and, in any event, petitioner only acquired the tape under the Act's straightforward duty of nondisclosure. *Aguilar*, 515 U.S. at 605. Contrary to petitioner's assertion, the line of cases culminating in *Florida Star* that applied strict scrutiny to content-based prohibitions against the publication of information provided by the government do not apply to content-neutral prohibitions against disclosing information which has both been unlawfully acquired and unlawfully transmitted to the defendant. *See supra* p. 6.

F.3d 109 (3d Cir. 1999), *petition for cert. filed, Bartnicki v. Vopper* (U.S. Apr. 19, 2000 (99-1687), and *petition for cert. filed, United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728). For the reasons explained in those petitions, the Third Circuit's invalidation of the Act is both an erroneous application of intermediate scrutiny and in tension with the D.C. Circuit's decision here. Respondent concedes that the issue in this case is an important one and that the Third Circuit's approach in *Bartnicki* is inconsistent with the decision below. For the reasons outlined below, respondent respectfully submits that the Court should grant *certiorari* in both this case and *Bartnicki* and consolidate the cases for argument.

Granting review in this case would facilitate the full exploration of all the First Amendment issues implicated by the Act or similar measures prohibiting the disclosure of illegally obtained speech or information. First, the speech illegally intercepted here was a discussion among congressional leaders about important congressional business and thus is at the core of the speech protected by the First Amendment. Indeed, the Speech and Debate Clause of the Constitution guarantees the absolute confidentiality of this conversation against all efforts to seek its disclosure. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Petitioner asserts that the public importance of this speech somehow argues in favor of sanctioning its illicit, unauthorized disclosure under the First Amendment. This, of course, has it precisely backwards. The societal interest in avoiding the chilling effect of unauthorized disclosure is at its zenith when the speech being disclosed is internal deliberations among government leaders about important public affairs. This is the

reason such speech is given special protection against disclosure under the Speech and Debate Clause and "executive privilege" doctrines. *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974). If anything, then, illicit revelation of such speech is particularly disfavored and especially destructive of one's First Amendment "freedom *not* to speak publicly." *Harper & Row*, 471 U.S. at 559 (emphasis added). In any event, the fact that core political speech is at issue here makes this a particularly appropriate vehicle for resolving the First Amendment issues presented.

In addition, the person disclosing the illegally intercepted conversation here is a Member of Congress who concededly received the stolen tape "because of his position as ranking member of the House [Ethics] Committee," Joint Appendix, *Boehner v. McDermott*, No. 98-7156 (D.D.C.) 145. As such, like the federal judge in *Aguilar*, he is a "government official in [a] sensitive confidential position" and thus is subject to "special duties of nondisclosure." *Aguilar*, 515 U.S. at 605-06. Accordingly, review of this case, in conjunction with *Bartnicki*, would enable the Court to explicate the duties of nondisclosure that may permissibly be imposed on public officials, private citizens and media entities, to the extent they may differ.

Further, as the Third Circuit emphasized at length, petitioner McDermott, unlike the defendant in *Bartnicki* who received the tape from an unknown source, actively and directly participated in the illegal transaction by which the tape was given to him by those who illegally intercepted the conversation. *Vopper* Pet. App. 40a. While we believe that the Third Circuit erred in making this

distinction dispositive since the Act may constitutionally be applied to both those who receive an illegally intercepted conversation from an unknown source and those who directly conspire with the thief, granting review in this case would allow the Court to resolve this issue. Finally, this case involves two sitting members of Congress involved in a well-publicized public controversy and the opinions below thoroughly discuss the relevant constitutional considerations in a thoughtful and comprehensive manner.

CONCLUSION

For the foregoing reasons, respondent does not oppose *certiorari* and, if *certiorari* is granted in *Bartnicki*, believes that *certiorari* should be granted here and the cases should be consolidated for argument.

Respectfully submitted,

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No. 99-1709

In the Supreme Court of the United States

JAMES A. MCDERMOTT, PETITIONER

v.

JOHN A. BOEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) for disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

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In the Supreme Court of the United States

No. 99-1709

JAMES A. MCDERMOTT, PETITIONER

v.

JOHN A. BOEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 191 F.3d 463. The memorandum opinion of the district court (Pet. App. 46a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1999. A petition for rehearing was denied on December 28, 1999 (Pet. App. 43a-45a). On March 8, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 26, 2000. The petition for a writ of certiorari was filed on April 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner James McDermott is alleged to have received a recording of an illegally intercepted telephone conversation from the individuals who intercepted the conversation, and to have disclosed the contents of that recording to members of the news media with knowledge that the information was illegally intercepted. Pet. App. 2a-3a. Those allegations, if taken as true, establish that petitioner violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (Title III). The district court held that imposing civil liability on petitioner under Title III would violate the First Amendment. The court of appeals reversed.

1. Title III is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), and is designed to "protect effectively the privacy of wire and oral communications." Pub. L. No. 90-351, Tit. III, § 801(b), 82 Stat. 211 (congressional findings). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (1968 Senate Report); *Gelbard*, 408 U.S. at 48. Consistent with that goal, Title III broadly prohibits the interception of wire, oral, and electronic communications except where authorized through the mechanisms provided by Title III itself. 18 U.S.C. 2511(1)(a). Sections 2516 and 2518, in turn, set forth the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). See also 18 U.S.C. 2511(2).

As enacted in 1968, Title III applied only to wire and oral communications. See Tit. III, § 802, 82 Stat. 212.

In 1986, however, Congress amended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications, see 18 U.S.C. 2510(12) (1994 & Supp. IV 1998), and to clarify that Title III extends to communications on cellular and other wireless telephone systems, see 18 U.S.C. 2510(1). See also Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, 99th Cong., 2d Sess. 1-3, 7-8, 11 (1986).[1]

Because the interception of communications is generally a surreptitious and difficult-to-detect enterprise, the fact or source of such an invasion "[a]ll too often * * * will go unknown." 1968 Senate Report 69; see also *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."). In part for that reason, Congress determined that merely prohibiting unauthorized surveillance itself would not be sufficient. *Id.* at 69. Instead, Congress concluded that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Ibid.*

Accordingly, Congress accompanied the prohibition on unauthorized electronic eavesdropping and interception with restrictions on the use of the fruits of such invasions. 1968 Senate Report 69. See, *e.g.*, 18 U.S.C. 2515 (unlawfully intercepted communications inadmissible as evidence). Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any

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[1] Before the 1986 amendments, it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). ECPA makes it clear that Congress intended to bring cellular phone communications within the ambit of Title III. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 404-405 (3d Cir. 1990).

wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that it "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." Section 2511(1)(d) makes it unlawful for any person with the same knowledge or reason to know to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Title III thus proscribes *all* unauthorized uses of the contents of illegally intercepted communications, including but not limited to their disclosure, by persons knowing or having reason to know of their unlawful interception.

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award such "relief as may be appropriate," including declaratory and injunctive relief, "actual damages" or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. Respondent John Boehner is a Republican Member of the House of Representatives. In December 1996, Boehner participated in a telephone conference call with other Republican Members of the House, including then-Speaker Newt Gingrich. The conference call concerned ethics charges then pending against Speaker Gingrich in the House Ethics Committee. Boehner used a cellular telephone to participate in the conference call. Two individuals, John Martin and Alice Martin, intercepted the call using a police scanner and made a tape recording of the call. Pet. App. 2a-3a. In

so doing, the Martins violated Title III's prohibition on intentional interception in 18 U.S.C. 2511(1)(a).[2]

In January 1997, the Martins hand-delivered a copy of the tape recording to petitioner McDermott, who was then the ranking Democratic Member of the House ethics committee.[3] Pet. App. 3a. The tape was accompanied by a letter from the Martins to petitioner, which stated: "Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996. * * * The call was a conference call heard over a scanner." The letter further stated: "We understand that we will be granted immunity." *Id.* at 4a, 63a. Petitioner took the tape from the Martins and told them that he would listen to it. Shortly thereafter, petitioner gave copies of the tape recording to the *New York Times* and other newspapers, which published articles reporting the contents of the conference call. *Id.* at 3a. Petitioner did so with the knowledge that, as indicated by the Martins' cover letter, the conference call had been intercepted in violation of Title III.

In March 1998, Boehner filed a private civil action against petitioner in the United States District Court for the District of Columbia under Title III and the Florida Security of Communications Act, Fla. Stat. Ann. § 934.03(1)(c) (West 2000). Pet. App. 4a, 49a. Boehner claimed that petitioner violated 18 U.S.C. 2511(1)(c) and the corresponding provision of the

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[2] The Martins later pleaded guilty to criminal charges under Title III and were fined as provided by 18 U.S.C. 2511(4)(b)(ii). Pet. App. 4a.

[3] The following facts are taken from the allegations in Boehner's complaint. Because the district court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the allegations in the complaint must be taken as true for present purposes.

Florida statute by disclosing the taped contents of the conference call to the newspapers with knowledge and reason to know that the conversation had been intercepted unlawfully. Boehner sought statutory and punitive damages under 18 U.S.C. 2520 and the Florida statute. Pet. App. 4a-5a, 49a.

Petitioner moved to dismiss the complaint, arguing *inter alia* that the application of Title III and the Florida statute to his conduct would violate the First Amendment. Pet. App. 5a, 49a. In particular, petitioner argued that the First Amendment bars the imposition of liability on individuals who disclose the contents of unlawfully intercepted conversations concerning matters of public significance if they did not participate in or encourage the initial interception. *Id.* at 5a. In July 1998, the district court granted petitioner's motion. *Id.* at 46a.

The district court declared, at the outset, that petitioner's argument "is a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes" like Title III. Pet. App. 51a. Under petitioner's theory, the district court explained, the government "has no means to prevent the disclosure of private information, because criminals * * * can literally launder illegally intercepted information," by "steal[ing] a conversation and giv[ing] it to someone else, who could then disseminate the information with impunity." *Id.* at 51a-52a. Thus, unless the dissemination of illicit recordings by individuals other than the initial eavesdropper can be prohibited, the court concluded, "the effect of the statute is diluted into nothingness." *Ibid.*

Nonetheless, the district court determined that applying Title III's disclosure provision to petitioner would violate the First Amendment. The district court

first held that 18 U.S.C. 2511(1)(c) is subject to strict scrutiny under the First Amendment when applied to the disclosure of illegally intercepted communications, about matters of "public significance," by persons who did not themselves participate in the illegal interception. Pet. App. 54a-56a (citing *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989)). In this case, the district court held, Section 2511(1)(c) does not survive strict scrutiny because the government interests are not sufficiently important. *Id.* at 57a-58a.

3. Respondent appealed, and the United States intervened in the appeal pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Title III. In September 1999, a divided panel of the court of appeals reversed the district court and remanded the case for further proceedings. Pet. App. 1a.

The panel majority held that the application of Section 2511(1)(c) to petitioner was subject to intermediate scrutiny rather than strict scrutiny. In a portion of the opinion (Pet. App. 8a-13a) authored by Judge Randolph and joined by Judge Ginsburg, see *id.* at 29a, 32a (Ginsburg, J.), the majority held that intermediate scrutiny is appropriate because Title III contains "generally applicable, content-neutral prohibitions on conduct that create incidental burdens of speech." Pet. App. 8a. Section 2511(c), the majority further explained, prohibits the disclosure of all illegally intercepted communications, without regard to the substance of the communication or the identity of the speaker or discloser. *Ibid.* Section 2511(c), the court added, evidences no interest in distinguishing among types of speech based on content or viewpoint. *Ibid.*

The court of appeals concluded that application of Title III to petitioner passes intermediate scrutiny because it (1) furthers an important government interest

unrelated to the suppression of free expression and (2) restricts speech no more than is necessary to further that interest. Pet. App. 8a. The government has a substantial interest, the court of appeals observed, in promoting speech by ensuring that electronic eavesdroppers do not threaten the privacy of conversations. *Id.* at 9a. "Interception itself is damaging" to that goal, the court explained, but "the damage [is] all the more severe when illegally intercepted communications may be distributed with impunity." *Ibid.*

The court also compared this case to a hypothetical case in which, rather than illegally intercepting a phone call, the Martins illegally break into respondent Boehner's office and steal a recording (hypothetically made by Boehner himself) of the conversation; the Martins then, according to the hypothetical, pass the stolen recording to petitioner. Pet. App. 11a. In such a case, the court explained, "there is no doubt that if [petitioner] knew how the Martins acquired the tape," *i.e.*, by breaking an entering and stealing it, "he could be prosecuted for receiving stolen property." *Ibid.* The court continued:

> With respect to [petitioner], it is hard to see any practical constitutional distinction between the hypothetical and the facts alleged here. In one case the Martins steal the tape; in the other, they illegally 'seize' the conversation.

Id. at 11a-12a. Just as the government can punish the receipt of stolen property to "dry up the market for stolen goods," the court of appeals held, so too Congress can forbid the "disclosure of the contents of illegally intercepted communications" to dry up the market for intercepted communications. *Id.* at 12a.

The court of appeals also concluded that Section 2511(c) goes no further than is essential to further the government's interest. "Unless disclosure is prohibited, there will be an incentive for illegal interceptions," and "the damage caused by an illegal interception will be compounded." Pet. App. 12a. As a result, the court of appeals concluded, "[i]t is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping." *Ibid.* Rather, it was "essential" for Congress to impose on those who were not responsible for the illegal interception, but who know or have reason to know that the communication was illegally intercepted, "a duty of nondisclosure." *Id.* at 12-13a.

Writing for himself, Judge Randolph also indicated that intermediate scrutiny was appropriate because petitioner was being sued for conduct, *i.e.*, for turning the recording of the communication over to the press, rather than for speech. Pet. App. 5a-7a (Randolph, J.). Judge Randolph further explained that this Court's decision in *Florida Star*, *supra*, is not controlling because (among other things) *Florida Star* specifically reserved whether the government could impose liability for the disclosure of "information that has been acquired *unlawfully* by a newspaper or a source." Pet. App. 16a (quoting 491 U.S. at 535 n.8) (emphasis added). In this case, Judge Randolph observed, the original source of the communication (the Martins) obtained it unlawfully. *Id.* at 17a.

In a separate opinion (Pet. App. 29a-32a), Judge Ginsburg agreed that intermediate scrutiny was proper because, in his view, petitioner "did not in fact lawfully obtain the tape." *Id.* at 29a. Judge Ginsburg observed that petitioner, at the time he accepted the tape, knew that the Martins were violating Title III by disclosing it to him, even if he was not violating Title III by

accepting it. "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense," he stated. *Id.* at 30a. Consequently, he concluded, *Florida Star* did not control the case and intermediate scrutiny was appropriate. *Id.* at 30a-31a.

Judge Sentelle dissented. Pet. App. 32a-42a. In his view, Title III's prohibition on disclosure is subject to strict scrutiny under a line of cases beginning with *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and ending with *Florida Star*, *supra*. Pet. App. 34a-37a. Although Judge Sentelle conceded that "there are distinctions" between this case and those, the distinctions do not, in his view, permit a difference in results. *Id.* at 37a. Instead, he reads this Court's cases as holding that statutes punishing the publication of truthful information of public significance are subject to strict scrutiny. *Id.* at 40a. Here, he concluded, the statute would not survive that level of scrutiny because it is not narrowly tailored to serve the government's compelling interest. *Id.* at 40a-41a.

ARGUMENT

The court of appeals correctly rejected petitioner's First Amendment challenge to the application of Title III on the facts alleged in the complaint. The decision, however, is inconsistent with a decision of the United States Court of Appeals for the Third Circuit, which sustained a virtually identical First Amendment challenge to an application of Title III. See *Bartnicki* v. *Vopper*, 200 F.3d 109 (1999). The plaintiffs in that case as well as the government (which intervened to defend the constitutionality of Title III) have each filed a petition for a writ of certiorari, *Bartnicki* v. *Vopper*,

No. 99-1687 (filed Apr. 19, 2000); *United States* v. *Vopper*, No. 99-1728 (filed Apr. 27, 2000). In our view, the *Bartnicki* case is a better vehicle for review of the constitutionality of Title III's use restrictions under the First Amendment, and the Court's consideration of the constitutional issue in *Bartnicki* would not be significantly aided by undertaking plenary review of this case as well. The Court therefore should hold this petition pending disposition of the petitions in *Bartnicki*, Nos. 99-1687 and 99-1728.

1. In *Bartnicki*, the Third Circuit was presented with Title III claims growing out of the illegal interception and recording of a telephone conversation between two representatives of a local teachers' union, Gloria Bartnicki and Anthony F. Kane. In that conversation, the two discussed ongoing labor negotiations with the local school board. Those negotiations were highly contentious, and had been the subject of both public comment and extensive press coverage. 200 F.3d at 113.

The recording of the conversation was given anonymously to Jack Yocum, an individual who was opposed to the union's bargaining proposals. Yocum gave the recording to Frederick Vopper, the host of a local radio show. Vopper, in turn, played the recording during his show, which was broadcast by two radio stations. Bartnicki and Kane brought suit against media defendants (Vopper and the two radio stations), and a non-media defendant (Yocum), alleging violations of Section 2511(1)(c), which prohibits the disclosure of unlawfully intercepted communications, and Section 2511(1)(d), which prohibits all other uses of unlawfully intercepted communications. The district court denied a motion by the defendants for summary judgment on First Amendment grounds, but a divided panel of the Third Circuit reversed. As applied to disclosures of portions of inter-

cepted telephone calls containing information of public significance, the court of appeals held that Section 2511(1)(c) and (d) violates the First Amendment insofar as it prohibits "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." 200 F.3d at 129.

Petitioner correctly claims (Pet. 22-26) that the decision in this case, which upholds Section 2511(c) against an almost indistinguishable First Amendment challenge, is difficult to reconcile with the decision in *Bartnicki*. See also 99-1728 Gov't Pet. at 15-17, *United States* v. *Vopper*, *supra*. Moreover, the constitutional issues addressed in these cases are important. Title III's restrictions on the disclosure and use of illegally intercepted communications are designed to protect the privacy and security of channels of private communication and thereby encourage the free and voluntary exchange of information and ideas. The Third Circuit in *Bartnicki* and the court of appeals in this case both correctly determined that the application of Title III to the claims before them warranted intermediate scrutiny, rather than strict scrutiny, under this Court's First Amendment precedents. See 99-1728 Gov't Pet. at 10-12 (explaining why intermediate scrutiny is appropriate). Having adopted the same standard of review, however, the two courts reached fundamentally different conclusions regarding the outcome of that review. For the reasons summarized in the government's petition for a writ of certiorari in the *Bartnicki* case, the Third Circuit's application of intermediate scrutiny analysis is unsound, 99-1728 Gov't Pet. at 13-15, and, if left uncorrected, will substantially undermine the efficacy of Title III as a means of protecting private communications, *id.* at 19-20.

2. Although both this case and the *Bartnicki* case present similar challenges to Title III, in our view *Bartnicki* provides a better vehicle for this Court's review. First, the First Amendment challenge in this case is somewhat narrower than the challenge in *Bartnicki*. In particular, respondent Boehner brought suit only against petitioner McDermott, the individual who disclosed the illegal recording to the news media; Boehner did not sue the members of the news media who published the contents of the recording. In holding that the application of Section 2511(1)(c) to petitioner did not violate the First Amendment, the court of appeals expressly declined to decide the constitutionality of Section 2511(1)(c) "as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." See Pet. App. 7a, 27a-29a.

In *Bartnicki*, in contrast, the plaintiffs brought suit not only against the non-media source of the intercepted communication, Jack Yocum, but also against the radio talk show host who played the tape on his show (Frederick Vopper) and the radio stations that broadcast that show. See 200 F.3d at 112. The First Amendment does not necessarily accord the media and private individuals different treatment. Compare Pet. App. 26a n.20 (stating that "the press has no greater First Amendment rights than anyone else"), with *id.* at 26a-27a (reserving the question of whether the media can be held liable for publishing the recording that petitioner gave them). The fact remains, however, that *Bartnicki* concerns the constitutionality of imposing liability not only on non-media defendants, but on media defendants as well; this case, in contrast, concerns only the constitutionality of imposing liability on the former.

This case is narrower than *Bartnicki* in another sense as well. Respondent Boehner asserted claims

only under Section 2511(1)(c), which bars the *disclosure* of communications obtained in violation of Title III. He did not assert any claims under Section 2511(1)(d), which bars all other *uses* of such communications. As a result, the court of appeals had no occasion to address the constitutionality of Section 2511(1)(d). In contrast, the plaintiffs in *Bartnicki* asserted both claims, and the court of appeals' decision there addresses the constitutionality of both Section 2511(1)(c) and Section 2511(1)(d). Consequently, the *Bartnicki* case provides this Court with a more comprehensive setting in which to evaluate the First Amendment implications of Congress's efforts to protect the privacy of communications under Title III.

3. The Court's consideration of these issues would not, in our view, be materially advanced by granting certiorari in both *Bartnicki* and in this case. Both cases concern intercepted cellular telephone conversations that contain discussions of matters of public concern. In *Bartnicki*, the intercepted and recorded communication concerned the teachers' union's highly contentious negotiations with the local public school board. In this case, the intercepted and recorded communication concerned the development of a response by political officials to an expected House Ethics Subcommittee announcement of an agreement between the Subcommittee and the Speaker of the House resolving an ethics investigation. Although the underlying facts of the two cases plainly differ, the cases do not differ in ways that appear to bear on the constitutional analysis. Both cases involve private communications about interaction with governmental bodies—communications that, in context, implicate matters of public concern. And in neither case was the party that disclosed or used the intercepted communication directly or indirectly in-

volved in the unlawful interception. As petitioner himself admits, "*Bartnicki* is indistinguishable from this case." Pet. 23. Nor do we see any advantages in having an additional factual scenario presented in a companion case that would outweigh the additional burdens and complications that would arise from potentially duplicative briefing and argument. To the extent that petitioner McDermott and respondent Boehner may wish to present arguments not otherwise developed by the parties in *Bartnicki*, they are free to present the Court with their views as *amici curiae*.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the petitions for a writ of certiorari in Nos. 99-1687 and 99-1728.

Respectfully submitted.

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No. 99-1709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION

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May 30, 2000

Both respondent Boehner and the Government agree with petitioner that this case presents a First Amendment question of exceptional importance on which the D.C. Circuit and the Third Circuit are divided. The only disagreement among the parties, in fact, is whether the Court should grant this petition or the forthcoming petitions on the other side of the circuit split in the *Bartnicki* case. The Government, a petitioner in *Bartnicki*, urges the Court to hold this case and grant *Bartnicki* instead. This Court, however, should not allow the Government to cherry-pick the particular case in which it defends the constitutionality of a federal statute. For the reasons set forth below, as well as those advanced by Rep. Boehner, the Court should grant the petition in this case.

At the outset, it is important to keep in mind that the Government is not a disinterested observer in either this case or *Bartnicki:* it is a *party* in both cases, having intervened below to defend the constitutionality of the challenged statute as applied in each case. Needless to say, the Government as a party litigant has a strong interest in persuading this Court to grant *certiorari* in the case deemed to optimize its chances of success. There is, of course, nothing wrong with that: the Government has not only the power but the duty zealously to defend the statute. But the fact that the Government prefers the *Bartnicki* case to this one is hardly a reason for this Court to choose the one over the other.

It is not surprising that the Government seeks to avoid defending the constitutionality of the statute as applied in this case rather than in *Bartnicki*. As explained in the petition, this case presents about as stark an issue of free speech as can be imagined: one public official is seeking to punish another public official for allegedly disclosing a conversation that revealed apparent official misconduct by yet another public official. Rep. Boehner does not allege that the intercepted conversation revealed any private or embarrassing facts about him, and seeks only statutory and punitive (not compensatory) damages. As the district court put it, Rep. Boehner "seeks less

to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives." Pet. App. 58a. The First Amendment in no way tolerates the punishment of speech under these circumstances.

Nor it is surprising that the Government seeks to avoid defending the rationale of the divided D.C. Circuit majority below. Judge Randolph's lead opinion rests on the theory that intermediate scrutiny is appropriate because this case involves conduct rather than speech. *See* Pet. App. 5a-7a. Judge Ginsburg's concurring opinion rests on the theory that intermediate scrutiny is appropriate because Rep. McDermott did not "'lawfully obtain'" the disputed information "within the intendment of that phrase in *Florida Star*," even though he concededly broke no law in obtaining that information. *See id.* at 32a (brackets omitted). The Government conspicuously declines to defend *either* of these theories. Rather, the Government asserts that intermediate scrutiny is appropriate because the challenged statute is a content-neutral law of general applicability. *See* Gov't Br. 12 (incorporating by reference arguments advanced at pp. 10-12 of the petition in *United States v. Vopper*, No. 99-1728).

Conveniently enough, the Third Circuit in *Bartnicki* expressly *accepted* the Government's legal theory "that intermediate scrutiny applies because the Acts are content-neutral." 200 F.3d at 121. The panel majority simply held that, as applied to the facts of that case, the statute could not survive even intermediate scrutiny. The *Bartnicki* dissent expressed a "general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents," and emphasized that "[w]here I part company with the court is in its *application* of intermediate scrutiny in this case." *Id.* at 130-31 (emphasis added); *see also* Gov't Br. 12 ("[T]he Third Circuit's *application* of intermediate scrutiny analysis is unsound.") (emphasis added).

Needless to say, the Government would much prefer to have this Court review the relatively narrow dispute in *Bartnicki* over the application of intermediate scrutiny rather than the fundamental and wide-ranging disagreement among *all three judges* on the D.C. Circuit panel below about the governing legal standards, including the appropriate level of judicial scrutiny. But that does not render *Bartnicki* "a better vehicle for this Court's review." Gov't Br. 13. The Government gives two reasons for that assertion, both of which are insubstantial.

First, the Government emphasizes that *Bartnicki* involves both media and non-media defendants, whereas this case involves only a non-media defendant. (Rep. Boehner chose not to sue *The New York Times* or any of the other newspapers that disclosed the contents of the disputed audiotape.) Not one of the judges below, however, gave any weight to that distinction, and this Court has soundly rejected it. *See* Pet. App. 26a n.20 ("It is good that our dissenting colleague believes the press has no greater First Amendment rights than anyone else. The Supreme Court agrees with him. So do we.") (citing, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)); Pet. App. 38a-39a (Sentelle, J., dissenting) ("I cannot think that the identity of the communicator can be a distinction of difference. . . . The First Amendment protections of speech and press extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources.").[1] The Government itself has never suggested at any

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[1] Judge Randolph recognized that his dispositive speech/conduct distinction would not apply "to a newspaper who published excerpts from the tape—who, in other words, engaged in speech." Pet. App. 27a; *see also id.* at 7a (refusing to consider application of the speech/conduct distinction "to the newspapers who published the initial stories about the illegally-intercepted conference call"). But that does not mean, as the Government asserts, that Judge Randolph reserved the question whether a media defendant is entitled to greater First Amendment protection than a non-media defendant. To the contrary, as noted in the text, Judge Randolph

(continued...)

point in this litigation (and *still* does not suggest, *see* Gov't Br. 13) that there is any basis for affording the media greater free speech rights than private individuals.

Second, the Government notes that the *Bartnicki* plaintiffs sued under both subsection 2511(1)(c), which bars the *disclosure* of an unlawfully intercepted communication, and subsection 2511(1)(d), which bars the *use* of such a communication, whereas Rep. Boehner sued only under the former provision. Again, that is a distinction without a difference. *Bartnicki* did not involve any alleged use of the intercepted communication distinct from its disclosure. Because *Bartnicki* (like this case) involves an as-applied constitutional challenge, it does not implicate the constitutionality of subsection 2511(1)(d) as applied to some theoretical "use" that does not involve disclosure. Indeed, the Third Circuit expressly declined to "decide whether this statute could properly be subjected to lesser scrutiny if applied to prohibit 'uses' that do involve such 'nonspeech' elements." 200 F.3d at 121. The court simply noted that where (as there) the challenged use is a disclosure, the statutory prohibition on "use" is logically subject to the same First Amendment scrutiny as the statutory prohibition on "disclosure." *See id.* ("A statute that prohibited the 'use' of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings.").

Contrary to the Government's assertion, this case presents a better vehicle for this Court's review of the important First Amendment question presented than *Bartnicki* for at least three reasons.

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[1] (...continued)
expressly addressed that question, and rejected any such distinction. *See also* Pet. App. 38a (Sentelle, J., dissenting) ("[A]s the court holds today that the state can punish the release by McDermott based on the manner in which his source obtained that information, in a later day the state can burden the publishers of newspapers and the broadcasters of television and radio on the same basis.").

First, as noted above, the critical legal issue in both cases—the appropriate First Amendment analysis and level of judicial scrutiny—was *not* dispositive in *Bartnicki*, where both the majority and the dissent *agreed* on the law, and simply disagreed on the application of law to fact. In this case, in contrast, all three judges disagreed over the appropriate First Amendment analysis, and the majority and the dissent disagreed in particular over the appropriate level of scrutiny. (Judges Randolph and Ginsburg concluded that intermediate scrutiny applied and was satisfied; Judge Sentelle concluded that strict scrutiny applied and was not satisfied.) Those issues, accordingly, are potentially dispositive here. It would make little sense for this Court to pass over this case in favor of another case in which resolution of the critical legal issues made no difference in the result below.

Second, *Bartnicki* does not present the question deemed critical by Judge Ginsburg in this case: whether someone who allegedly received unlawfully intercepted information directly from the interceptor "lawfully obtained" that information. *See* Pet. App. 32a. (In *Bartnicki*, in contrast to this case, the unlawfully intercepted information was dropped off anonymously by the interceptor. *See* 200 F.3d at 113.) To the extent that this factual distinction has any First Amendment implications (and the *Bartnicki* court appeared to believe that it did, *see* 200 F.3d at 128-29), *Bartnicki* appears to involve the more idiosyncratic fact pattern. *See, e.g., Peavy v. Harman*, 37 F. Supp. 2d 495, 503 (N.D. Tex. 1999) (unlawfully intercepted tape received directly from interceptor), *appeal pending* (5th Cir. Nos. 99-10272, 10303); *Keller v. Aymond*, 722 So. 2d 1224, 1226 (La. App. 1998) (same), *cert. denied*, 120 S. Ct. 397 (1999).

Third, *Bartnicki* involves a conversation among private individuals allegedly disclosed by a private individual, whereas this case involves a conversation among public officials allegedly disclosed by a public official. Although, as the petition points out (and the Government emphasizes, *see* Gov't

Br. 14), both cases involve the disclosure of information on matters of "public concern," the information at issue here involves *more* than just a matter of public concern: it involves apparent official misconduct by the Speaker of the United States House of Representatives. As this Court has recognized, "the publication of information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the *core* of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (emphasis added). If the disclosure of such information can be punished by a political opponent, then the protections of the First Amendment are more illusory than real.

To be sure, all parties here agree that "'*Bartnicki* is indistinguishable from this case,'" Gov't Br. 15 (quoting Pet. 23), on the core issue whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously obtained that information unlawfully. But that does not mean that there are no distinctions in the facts or the decisions below that render this case the better vehicle for this Court's consideration of that important issue. Indeed, both Rep. McDermott and Rep. Boehner—who agree on virtually nothing else in this lawsuit—agree that this case warrants review. The Government's desire to obtain review of its forthcoming petition in *Bartnicki* is no reason for the Court to pass over this petition. The Government can just as easily present its arguments in defense of the challenged statute as a respondent in this case than as a petitioner in *Bartnicki*.[2]

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[2] And, to the extent that *Bartnicki* is also deemed worthy of review, this Court could always grant both cases and consolidate them. The Court has often followed that approach where, as here, cases arrive virtually simultaneously from different circuits presenting a common legal issue in slightly different factual contexts. *See, e.g., Wilson v. Layne*, 525 U.S. 981 (1998) (granting petition and consolidating with *Hanlon v. Berger*); *Muscarello v. United States*, 522 U.S. 1023 (1997) (granting petition and consolidating with *Cleveland v. United States*); *United States v. Ursery*, 516

(continued...)

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for writ of *certiorari*.

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[2] (...continued)
U.S. 1070 (1996) (granting petition and consolidating with *United States v. $405,089.23 in United States Currency*); *Landgraf v. USI Film Prods.*, 507 U.S. 908 (1993) (granting petition and consolidating with *Rivers v. Roadway Express, Inc.*).